IN THE

SUPREME COURT

OF BRITISH COLUMBIA.

SEWELL AND OTHERS, PLAINTIFFS,

vs.

THE B. C. TOWING AND TRANSPORTATION CO., Limited, AND THE MOODYVILLE SAW MILL CO., Limited, DEFENDANTS.

COMMONLY CALLED THE

THRASHER CASE.

JUDGMENTS

OF

Sir M. B. BEGBIE, C. J., and of CREASE and GRAY, Justices, (McCREIGHT, J., abs.)

Relative to the Unconstitutionality of Certain Acts of the Provincial Legislature affecting the Supreme Court.

10TH FEBRUARY, 1882.

VICTORIA:
THE COLONIST STEAM PRESSES.

THE

SUPREME COURT

OF BRITISH COLUMBIA.

THE HON. SIR MATT. BAILLIE BEGBIE, KNIGHT,

CHIEF JUSTICE.

THE HON. HENRY P. PELLEW CREASE,

THE HON. JOHN HAMILTON GRAY,

AND

THE HON. JOHN FOSTER McCREIGHT,

JUSTICES.

Sewell *vs.* British Columbia Towing Company and Moodyville Saw Mill Company.

British North America Act, 1867—Constitutional powers of Provincial Legislatures. Constitutional position of Judges of a Superior Court in a Province of Canada.

The Provincial Legislature had by a Local Act, 1881, chapter 1, sections 28, 32, declared that the sittings of the Supreme Court for reviewing *nisi prius* decisions, motions for new trials, etc., should be held only once in each year, and on such day as should be fixed by rules of Court, and that the Lieutenant-Governor-in-Council should have power to make rules of Court.

Held, by Sir *MATT. BAILLIE BEGBIE, C. J.*, and *CREASE* and *GRAY, JUSTICES, (McCREIGHT, J.*, absenté).

That the appointment of the days on which the Court should sit for such purposes is a matter of procedure, and of purely judicial cognizance, and is not within the power of the local Legislature either to fix by positive enactment, or to hand over to be fixed by any other person or persons, but belongs to the Court itself; and that the above sections are in that respect unconstitutional and void.

The power conferred by section 92 of the British North America Act on Provincial Legislatures is a legislative power, enabling them to exercise legislative functions merely, and does not enable them to interfere with functions essentially belonging to the Judiciary or to the Executive.

The Judges of the Supreme Court of British Columbia are officers of Canada, and by sections 129, 130, their power and jurisdiction remain as before Confederation, subject only to the constitutional action of the Parliament of Canada under the British North America Act, 1867.

The authority given by section 92, sub-section 14 to the local Legislature to make laws in relation to civil procedure, is confined to civil procedure in the Courts described in that sub-section, and the Supreme Court of British Columbia does not come within the meaning of that sub-section. The power to make laws in relation to criminal procedure in those Courts, *i. e.*, the Provincial Courts described in that sub-section, and as to all procedure in all other Courts is, either by the general or the particular words of section 91, reserved to the Parliament of Canada.

The local Legislature has no power to diminish or repeal the powers, authorities or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office by the Judges, whether as to residence or otherwise.

SIR M. B. BEGBIE, C. J.—The argument in this case has arisen under the following circumstances:

The plaintiffs, the owners of the ship "Thrasher," completely wrecked on the 14th July, 1880, while being towed by two tugs from Nanaimo, have commenced an action in the Supreme Court against the owners of the two tugs, alleging that the loss was occasioned by the neglect and misconduct of the tugs, and they claim $80,000 damages. Certain issues of fact were tried before myself and a special jury in June last, and on the 12th July I gave judgment in favor of the defendants, mainly in accordance with the findings of the jury. The plaintiffs were dissatisfied with my charge to the jury, with the findings, and generally with the judgment; and they wished to obtain a new trial, or to have judgment entered up for them, and to apply immediately to the full Court for that purpose. But the local Act, No. 1 of 1881, had in the meantime come in force on the 28th June last, the 28th section of which enacts that a full Court shall only sit once in each year, on a day to be named in the rules of Court, and by section 32 such rules were to be made by the Lieut.-Governor in Council. A full Court of the Supreme Court here had sat on the 27th June, and no day had been as yet appointed under the authority of the above statute for the sitting of the full Court: and it evidently might not be appointed for a considerable time. It was not concealed on the part of the plaintiffs that if the opinion of the full Court here should be unfavorable to them, they intended to take the case by way of appeal to the Supreme Court at Ottawa; but that Court does not generally take an appeal direct from a *nisi prius* decision. I therefore suggested that the plaintiffs should apply to that Court for special leave to appeal direct; and authorized them to state that in my opinion, from the magnitude of the amount at stake, the importance of the points of law involved and, above all, the indefinite delay which very recent local legislation had imposed upon any application to the full Court here, I thought it a case in which this unusual sort of appeal should be entertained, if consistent with the practice of that Court. An application to that effect was accordingly made to the Supreme Court of Canada, but that Court declined to entertain any appeal until the *nisi prius* decision had been submitted for review before the full Court here. An application was then made to myself in Chambers (7th November) and ultimately to all the judges on the 24th November, requesting that a full Court might be held by us forthwith of our own authority; and the ground was taken that the above sections 28 and 32 were *ultra vires*, unconstitutional, and void, so far as they hindered this. A notice, however, had then been recently published in the *Gazette* intituled a "Report "of a Committee of Council approved by the Lieut.-Governor," in which it was recommended that certain alterations in the rules of practice heretofore in use should be made, and also that a full Court should be held on the 19th of December. I therefore desired that the application should stand over until that day, when the validity of the objections to the above sections might be considered, and if overruled, that the application might then be made to us as a full Court; and that notice of that order should be given to the law advisers of the Crown.

On the 19th of December accordingly the three Judges now in Victoria (Mr. Justice McCreight being detained at Richfield) sat together, not as a full Court, but to determine whether we were then lawfully sitting as a full Court. A technical objection was immediately taken

that even assuming the validity of sections 32 and 28, no Order-in-Council had ever been made, but merely a report of a Committee of Council had been approved by the Lieut.-Governor, in which a sitting on the 19th December was recommended. As this was a matter which could readily be remedied, however, and as the Attorney-General was in attendance, we asked him if he could remove the doubts which had been cast on the validity of the clauses. He stated that he felt sure he could do so, and was perfectly ready to go on, but that he felt some difficulty as to his appearing to interfere in a case in which he was not retained on either side. As a grave constitutional objection appeared to us to be involved, striking at many acts of the local Legislature for which he is very possibly responsible, we gave him at once a *locus standi* as *amicus curiæ*. We then asked him to point out the words of the British North America Act which gave any authority to the local legislature to regulate the civil procedure of the Supreme Court, and he referred at once to the final words of section 92 sub-section 14. But as soon as it was suggested that those words seemed to be entirely confined to civil procedure in Courts constituted, made and organized by the province, and that this Court was by divers sections of the Act entirely taken out of that category; and that every topic of legislation not expressly given to the local legislature is by section 91 expressly given to the Dominion Legislature; he said that was to him an entirely new point, and he requested time to consider his argument. We adjourned accordingly, not as a full Court, but to consider the question whether we were then sitting as a full Court, until the 5th January. The Attorney-General then said that he did not feel that he could properly advise us as *amicus curiæ* until he had heard Mr. Theo. Davie's argument of the 24th November. We requested Mr. Theo. Davie to repeat his argument, and adjourned the consideration of the question until Wednesday the 11th January. On that day, however, the Attorney-General found himself unable to attend and we further adjourned till Friday the 13th January. On that day Mr. Theo. Davie repeated his argument; and the counsel for the defendants declining to say anything, the Attorney-General commenced as *amicus curiæ* his statement of the considerations which ought to guide our judgment, beginning with a review of the circumstances which led to the formation of the colony; but not concluding, he asked to be allowed to continue on Saturday. On Saturday he asked for a postponement till Monday; and on Monday and Tuesday the 16th and 17th, he concluded a review of the early history of the Colony and of Confederation at very considerable length, and discussed much less minutely the clauses of the British North America Act to which we had drawn his attention. We could not allow Mr. Theo. Davie to reply upon the observations of an *amicus curiæ*, and we adjourned to deliberate on the conclusion to which we should arrive.

The main line of argument, irrespective of the British North America Act, suggested by the Attorney General, so far as I understood him, was as follows: The Colony of British Columbia was originally established by settlement, not by treaty or conquest, and so had a wider and more indelible sort of legislative power. That power is continued since the Union and retained by a sort of transmission or inheritance even in its altered condition of a Province. The Legislature of the colony was completely sovereign, having even power conferred on it to alter its constitution by internal legislation and to adopt a different form of legislature.

He alleged that prior to confederation the Colonial Legislature alone and without any Imperial interference had wholly organized, maintained and constituted the Supreme Court and the judges thereof, and possessed despotic power over it and them, and the whole rules of procedure and practice of the Court, to the minutest detail. He said then, applying the British North America Act, this power is continued to the Province, the Legislative Council of which, alone and without any extraneous aid, has even power to create here a Court of Appeal from the Supreme Court. Further he maintained that when the British North America Act came to be applied to the colony, and to the Supreme Court, nothing therein contained altered or affected this relation. The Supreme Court is a Provincial Court, and by virtue of that epithet is within the express words of section 92 sub-section 14. He urged that section 96, which directed that the Judges are to be appointed by the Governor-General, merely stipulates which of several representatives of the Crown shall exercise that particular branch of the prerogative of the Crown—that when once the Judge is appointed, he is a mere Provincial officer. So as to the maintenance of the Judges, that is merely a pecuniary arrangement between the Province and the Dominion. There is nothing in that to impair the "omnipotence" of the local Legislature. The expressions of Lord Selborne in Regina *vs.* Burah (3 appeal cases Privy Council 905), are decisive and express, he said, to show that a local Legislature such as ours is by no means the delegate of its creator, but has within its own limits powers as plenary and supreme as the Imperial Parliament itself. Then, he said, section 129 of the British North America Act is quite clear. Provincial officers are thereby made expressly subject to the control of the Provincial Legislatures. From his point of view section 130 has been quite misunderstood. It does not mean that any officer *in* the Province (at the moment of confederation) who has to deal with any matter outside of section 91 is to be an officer of Canada, but it applies to every officer *of* the statutory Province, and provides that unless his duties are wholly outside of those matters, he is not to be deemed an officer of Canada. And various passages were cited from Doutre and other text writers which established, as he alleged, the pre-potent, inalienable, continuing authority of local Legislatures. He said that at all events, the point before us for consideration is a question of procedure; how to get a matter reviewed by the full court. That is beyond dispute embraced both by sub-section 13 of section 92, as a matter of "civil right"; and as being a step in the "administration of justice "in the Province" by sub-section 14, both which classes of topics are by section 92 placed exclusively within the grasp of the local Legislature, since this possesses the plenary powers of the Imperial Legislature, and the Imperial Legislature has certainly legislated directly on procedure. Lastly, the Attorney General suggested to us that our hands were tied by our own decisions; that all the three Judges now in Victoria, had, in different cases, affirmed that the capacity of regulating procedure resided solely with the Lieutenant-Governor in Council, viz: in Saunders *v*. Reed before myself, in Harvey *vs.* Corporation of New Westminster before Mr. Justice Crease, in Irving *vs.* Pamphlet before Mr. Justice Gray.

Before proceeding to examine the British North America Act, *i. e.*, before discussing the real question at issue, I shall endeavor to explain or rectify some errors in much that has been thus pressed upon us. The Attorney General appeared to me to be frequently misled by the use of the

term "Province," "Provincial" as applied to a court, or officer; which has a peculiar meaning when used of any of the members of the Dominion after the application of the British North America Act. But before 1867 the three original partners were equally called "Provinces," and they are so termed throughout the Act. And in reading that Act, and also perhaps in reading some of the judgments in the different courts of the Dominion, it is sometimes necessary to consider whether the old or the new political entity is intended. When the new and the old "provinces" are sharply contrasted, as in section 129 of the British North America Act, all ambiguity is avoided by using the names of the provinces as they existed previously to, and as they were to exist after confederation. In other parts of the Statute it is left to the context to explain the ambiguity. There is also a further ambiguity in the use of the epithet "Provincial"; which when applied to an office or department may mean that it is wholly the creature of and dependent on the Province, or merely that its field of operations is wholly confined to the Province. We may with equal propriety speak of a Provincial Lieutenant Governor or a Provincial Deputy Adjutant General, or on the other hand of a Provincial Minister or a Provincial Superintendent of Education. But the same epithet means two very different classes of officials. The former are allotted to, the latter derive from, the Province. In the one case are meant officers appointed and authorized by some power from without, *i. e.*, by the Dominion, to perform certain duties in the Province. In the other case, the officials draw all their authority from within the Province itself. The former owe no allegiance to the Province, nor any duty, except indirectly, having to carry out according to their respective commissions, the laws duly established in the Province, whether common law or statute laws; and as to statute laws, whether of Imperial, Dominion or Provincial enactment. And see accordingly the clear expressions of Chief Justice Ritchie in *Valin vs. Langlois*, (3 Can. S. C. R. 20). They are not however responsible to any Provincial authority, but only to the Dominion, whose creatures they are and whose mandate they bear. The latter class of officials owe allegiance to the Province, and are under its sole authority, being of its creation. And I think this distinction has been sometimes lost sight of in discussing the British North America Act, leading to apparent anomalies in that Act which do not really exist. It is scarcely possible to avoid some confusion of expression, for it might be misleading to call a call a Superior Court in any Province a Dominion Court simply. That epithet in strictness perhaps might imply a Court which has jurisdiction throughout the Dominion. The proper notion of a Superior Court in any Province seems to be that it is a Dominion Court, assigned by the Dominion to administer the laws in such Province.

It is also, I think, quite an error to suppose what was contended at great length before us, that any of the legislative authority existing in any colony or dependency before Confederation, can continue for one moment to survive the admission of such colony or dependency into the Dominion under the British North America Act,—or that any dependency so admitted, and thenceforth called a province, is capable of a continuous political existence. so as to be able to transmit to its new self any title to legislative authority, although its geographical boundaries, and even its geographical name, remain unaltered. Its political existence, so far as its legislative capacity is concerned, becomes completely extinct at the moment of its admission—(the executive, adminis-

trative and judicial powers being specially kept on foot in the manner and subject to the provisions mentioned in section 129)—and at the very same moment, and by the very act of admission which extinguishes the previous legislative powers, it acquires, under the authority of the British North America Act alone, a new charter as it were of legislative capacity, as to topics regulated, in the main, by sections 92, 93. And every topic and power of legislation which is not, on the whole Act, exclusively vested in the Provincial Legislature, is by section 91 swept within the sole jurisdiction of the Parliament of Canada. Chief Justice Harrison lays this down very clearly in Leprohon's case (40 Upper Canada, page 488) and points out that our constitution is in this respect the converse of the United States. And Spragge, Chanc., (same case on appeal, 2 Ontario, appendix 522) says: "The Province has only the "powers specifically conferred on it; the Dominion has all not specifically "conferred on the local legislatures." And Savary, County Court Judge, Nova Scotia, in a vigorous judgment cited approvingly by Doutre (constitut. of Canada, page 56) says: "All which is not expressly or by "necessary implication conferred on the local government and legislature resides in the Dominion." To which I would add, that any matter, to fall within the legislative capacity of the local legislature, must be given to it not only "expressly," or "specifically" or by "necessary implication" but exclusively; and not by this section or by that, but exclusively, on a comparison of the whole Act. So that if there be any conflict or concurrence of gifts, then inasmuch as the gift (so far as it is concurrent) is not exclusively to the Province, it falls, according to section 91, exclusively to the Dominion.

The next fundamental error I shall notice, which occupied a large part of the argument in support of the widest view of the legislative authority of the Province, was where the Attorney-General endeavored to support it upon the supposed difference between the local legislature in a dependency originally acquired by settlement, and a dependency acquired by treaty, or by settlement. And it was said that a dependency acquired by settlement had much larger legislative powers, or more indelable powers, than a dependency acquired by either of the two latter titles; and that British Columbia fell strictly within the first category. I think myself that (if it made any difference) it is arguable that British Columbia and Vancouver Island were not acquired wholly by settlement, apart from treaty; that the treaty of 1846 had a good deal to do both with the foundation of the original colony of Vancouver Island (1846), and of the original colony of the Mainland (1858), afterwards united as the Colony of British Columbia (1866), which now exists as a province of the Dominion (1871). And the absolute power of legislation placed by the Royal Authority in the hands of Governor Douglas for the first five years of the existence of the Colony (which the Attorney-General much pressed on our attention) looks very much as if British Columbia were treated at that time entirely as a colony by cession, according to Blackstone's view. (1 Stephen Blackstone, 99). But into this question it seems quite useless to enter; neither do I enquire whether the Attorney-General's proposition is anywhere true. It seems to be too clear for argument that whatever the nature or derivation of the local legislatures previously and up to the 20th July, 1871, those local legislatures became, as has been said, completely extinct on the admission of British Columbia into the Dominion, and that all the present provincial legislatures now have pre-

cisely the same authority within their respective geographical limits, viz: that given to them by the British North America Act, and no other authority; and that, not by transmission or inheritance, but solely and entirely by virtue of the Act. But the contention seems no less singular than erroneous; and I think it would not, for instance, meet with much favor in the Province of Quebec.

It was also strenuously maintained that the Supreme Court of British Columbia (under its various successive titles) from 1858 up to the moment of Confederation was wholly organized, maintained and constituted by Colonial authority, and it was especially contended that it was "organized" by Colonial authority alone. As to this last point it is to some extent a question of definition: what is meant by "organization?" If issuing a commission and nominating every Judge in either Vancouver Island or British Columbia up to the time of Confederation, enter at all into the notion of "organizing" the Court, then, certainly, the Supreme Court of British Columbia from 1858 to the time of Confederation was not wholly "organized" by the then Colony. But the consideration of this question again seems to me entirely immaterial. What is material, and what cannot be denied, is, that at and up to the moment of Confederation a Supreme Court of British Columbia existed in the then Colony, completely organized, maintained and constituted; possessed of all the jurisdiction, power and authorities which had been possessed either by the previous Supreme Court on the Mainland, or by the previous Supreme Court of Civil Justice of Vancouver Island: possessed also of all the additional powers mentioned in the last constituting ordinance previous to Confederation, (viz.) the British Columbia ordinance of 1869 (confirmed by an ordinance of 1870.) And all this, before the "Province," in its technical sense, had at all come into existence. This I do consider extremely important. Combined with other circumstances, I think that it places this Court at once under the Dominion Parliament, and removes it from the authority of the local Legislature, by virtue of section 129 of the British North America Act.

By far the larger portion of Attorney General's suggestions was taken up by the fallacies just pointed out, and which I need not further refer to.

The bare question before us is, whether section 28 of the Act of 1881, so far as it forbids any sitting of the full Court oftener than once a year, and so far as it authorizes the executive council to fix the time of sitting, is constitutional. But in order to support this section it became pretty evident that it was necessary to include a good deal more; and the Attorney-General claimed an "omnipotent" authority over the Judges of the Supreme Court and the Court itself, and over the procedure in that Court, by virtue of this "omnipotent" authority. The Judges were to be nominated and sent into the Province by the Governor General as officers purely of the Province, the servants, I had well nigh said the slaves, of the Legislature and Executive of the Province; to live wherever the Executive might appoint each from time to time to live, to do what the Legislature might appoint each from time to time to do. The only thing that the local Legislature could not do to a man while he was a Judge of the Supreme Court was to pay him; that is by the British North America Act reserved wholly to the Dominion authority.

But I think that such claims are altogether too extensive, even if they do not totally fail; and that on the true construction of the British North America Act, the Judges are responsible to the Dominion authority alone, who alone may vary or repeal the powers with which the Court was invested at the time of Confederation; and in particular (what is in fact the matter in issue) that the power of regulating whatever falls strictly within the meaning of the term "procedure" in the Supreme Court here, remains where it was before Confederation, viz: in the hands of the Supreme Court itself, subject to legislation in a constitutional way by the Parliament of Canada under section 129 of the British North America Act.

The attention of the Judges has been called to the various opinions expressed by them in August and September, 1880, with regard to the first Order in Council, 16th July, 1880, purporting to establish rules of court under section 17 of the Judicature Act, 1879; viz: the case of Saunders *vs.* Reed before myself: Harvey *vs.* Corporation of New Westminster, before Mr. Justice Crease: and Pamphlet *vs.* Irving before Mr. Justice Gray, with the view of showing that we all three then affirmed the legality of the power arrogated by the executive to make rules; and that we cannot without self contradiction now deny that power. Now, in fact, that point never came up for decision at all in any of the three cases. I do not mean to say that it was denied; but neither was it affirmed. It was never raised by the suitors. All the Judges were much puzzled as to the effect of that first Order in Council (published in *Gazette* 17th July, 1880.) It came first before myself, and I changed my mind about it more than once. In order to clear my views I placed them in writing. At first I inclined to think that the Order in Council was quite unmeaning, and so established no rules at all here; in which case, under section 19 of the Act of 1879, the old practice would have remained; but I finally concluded that the Order in Council had established some rules capable of being proved in evidence, but requiring such extraneous proof; and therefore they prevented me from conducting business in Chambers according to the former practice, without informing me what practice was substituted; reducing matters to a deadlock, removable only by evidence in every case brought forward. My statement or memorandum of arguments in support of my first views got into print, I do not know how. The report, of course, reads absurdly, for the arguments in it are directly at variance with the conclusion. But there never was any question raised in that case as to the validity of section 17, (1879), nor as to the authority of the Executive to make the Order in Council, 16th July; that was assumed and acquiesced in by all parties. The next Judge, whose opinion was taken, was Mr. Justice Crease, 6th August. He seems to have come to the same conclusion as myself; and there also, the power of the Executive seems to have been acquiesced in without ever being called in question. Lastly, Pamphlet *vs.* Irving was brought on before my brother Gray. He decided according to the view I had at first inclined to, viz: that the Order in Council, 16th July, was so utterly dark and obscure as to be a nullity, and therefore that it did not prevent the continuance of the old practice in chambers. But in none of these cases was the power of the Executive to make rules of procedure, which depends on the authority of the local legislature to invest it with such powers, called in question; nor did any of the Judges, nor could they, give any binding opinion at all whether the authority existed or not; and I do not choose to inquire

into the reasons for now publishing unauthorized reports of those cases with quite inaccurate headings. It is, perhaps, more important for the Attorney General's argument to observe, that on the ensuing 16th October another Order in Council was made, cancelling the order of the 16th July, and declaring a whole body of rules to be in force as from the 15th November following, called "the Supreme Court Rules, 1880;" and that these rules, never having had their authority tested by any suitor, have ever since from time to time construed and suffered to be applied by all the Judges, who in this way may seem to have acquiesced in the legality of the authority or authorities under which these rules were issued. But up to this time no decision has ever been given, nor could have been given, either one way or the other on that point. None has ever been requested. The question of their legality is now raised for the first time.

The position of a Judge is a very helpless one, especially in British Columbia. He cannot state his opinions except in judgments from the Bench. These are seldom heard, except by the parties interested; once delivered, all the reasoning, everything but the dry result is forgotten or imperfectly remembered: often misunderstood, and unintentionally misrepresented at the time, almost certain to meet that fate in the near future. And in matters not brought before a Judge for actual decision, he is more helpless still. All he can do in sight of legislation, however objectionable it may appear, is to lay a statement of his views before the Ministry. That communication may be considered strictly confidential; the receipt of it is acknowledged with or without thanks, and the document is pigeon-holed. A Judge cannot, consistently with his own self-respect, descend to whisper his doubts into the ears of litigants, or send a brief to the leader of the Opposition in the Legislature. He cannot write leading articles in newspapers, though Lord Cairns, C. B. Kelly and Lord Penzance did once each, and only once, I believe, write a letter to the *Times*. But with respect to the power reserved to the Executive in section 17 of the Judicature Act, 1879, since the Attorney General has relied upon our apparent continued acquiescence in its legality, it might be worth while to give the real history of that Act. But it may suffice to say that at every stage of the bill in its passage through the House, we warned the Attorney General, with all the energy at our command, of the more than doubtful constitutionality of two sections, viz: section 14 and section 17, both of which, we urged, would be certainly challenged at some time or other. These two sections, however, the Government insisted on retaining, without condescending to offer any argument or explanation. How just the apprehensions of the Judges were, may appear from this, that section 14 probably gave rise to the McLean case, and section 17 has given rise to the present discussion. It is rather too much for even judicial endurance that we should now be taunted with having acquiesced in the legality of the authority thus assumed by the Executive. We have on every legitimate occasion expressed the gravest doubts concerning it.

The fact is that all through the year 1880 we conceived the intention of the Executive to be to work out the Judicature Act, 1879, in a useful and proper way, upon the plan which we suggested to the Government, and almost exactly as we should have done ourselves; viz: following as closely and literally as possible the lines of the English rules; the "Supreme Court rules, 1880," being little else than a transcript of the English

rules, with geographical modifications. And, possibly, if the power rightly or wrongly assumed by the local Legislature had been exercised in a way useful, or at least not intolerable to the suitors, no question would even now have been raised as to the legality of their assumptions. But at the very end of 1880, two other Acts, "The Better Administration of "Justice Act, 1878," and the "Judicial District Act, 1879," came into operation. Against both of these Acts, the Judges had made strong protests, on the ground of unconstitutionality in some of their chief provisions; but both of them had been left to their operation by the Dominion Ministry. That, of course, cannot give them any validity which they do not otherwise possess. The direct effects of these Acts was to split up the Supreme Court into four District Courts, to be conducted each before a Judge of the Supreme Court, banishable into remote districts, and removable from one district to the other at the dictation of the local Executive: exactly the contrary policy to that of the Judicature Act, 1879. And they cast upon the Supreme Court Judges, as an obligation, all the duties of the County Court Judges—all whose judicial duties we had from time to time assumed when necessary, in our discretion under the Ordinance of 1867 (passed before Confederation). But indirectly these Acts did much more. By virtue of the "Mining Act, "1873," the Supreme Court Judge in each district would have to perform all the duties of a Gold Commissioner, including the duty of collecting petty fees and payments, and accounting for the same to the Provincial Treasurer. For it seems clear that if the Local Legislature can arbitrarily impose on a Supreme Court Judge the duties of a County Court Judge, it can with equal autocracy impose, and has imposed on a County Court Judge the duty of a Gold Commissioner; and if it can do this, I do not see why it has not equal authority to impose on a Supreme Court Judge any other duty in the Province, judicial or ministerial. By the "Minerals Act, 1878," it has equally imposed on every Supreme Court Judge in British Columbia (for gold mining is carried on in every "Judicial District") the duty of holding mining Courts daily throughout the year (Sundays and holidays excepted.) All these Acts or results seem logically to stand or fall together. If any one be constitutional they seem to be all constitutional, and to carry with them the above conclusions. But against these conclusions, or some of them, every Judge now on the Bench has protested, and flatly refused to obey. And the introduction of such laws here has compelled the Judges to look more closely than they were previously inclined to look into the authority for these usurpations.

Up to the year 1880, the constitutionality of Statutes created by derivative legislatures had been but little considered, at least in the British Courts of Justice; nor had it much engaged the attention of British text writers. But Leprohon's case in 1880, Valin *vs.* Langlois in 1880 and 1881, Regina *vs.* Burah in 1879, Todd on Colonial Parliamentary Government, and Doutre (both published 1880), and Cooley's Constitutional Limitations (4th edition 1880, the first which were brought to our notice) could not escape our attention; and compelled us, even had there been nothing unusual in the local statutes here to consider their validity in the light of these quite modern discussions. I should be ashamed to admit that these authorities have not enabled me to see more clearly distinctions which up to 1880 I had never been called upon to formulate and define. But I may say that ever since 1872

I have more or less closely expressed similar views, nor have I stood alone. For instance, ever since 1876 the Judges of the Supreme Court have insisted upon the two main positions on which Valin *vs.* Langlois and Leprohon *vs.* City of Ottawa were afterwards determined, and that in the most practical way; we rejected the demands of the Provincial tax-gatherer when he endeavored to levy income-tax on our judicial salaries; and we took among other grounds the following: 1st. That we were Dominion officials (afterwards so implied, necessarily, in Valin *vs.* Langlois.) 2nd. That the local Legislature had no power to tax Dominion salaries (afterwards so held in Leprohon's case.) And though the tax-gatherer twice, or thrice I think, repeated his demands, the Government never attempted to enforce them. This, however, was only a passive resistance, though very clear, and acquiesced in. Again, if I may refer to a matter entirely personal to myself, when I had occasion to apply for leave of absence in 1874, I applied to the Dominion Government, as being a Dominion officer; sending my application, of course, through the hands of the local Executive. And though that was opposed by the local Executive, who insisted that they alone had the power to grant or refuse leave, and declined to forward my application, and although, in order to save time, I complied with their wishes on that occasion, yet I felt bound to offer apologetic explanations (which were graciously accepted) to the Dominion authorities at Ottawa; and my view was upheld there, and the local Executive were informed to that effect; and now, when a Judge desires leave, he applies to the Dominion authorities alone. Of course, they receive and consider any report which the local Executive may think proper to make as to the local convenience of the leave; but the Dominion alone grants or refuses leave. How can they have this power, if the Judge is a purely Provincial officer? So that the local Executive is not without notice of the views expressed to-day. Still, if it had been merely the Judges who were personally inconvenienced by recent legislation, matters might never have come to an issue. But what has brought this question at length into serious argument and necessitated the expression of a judicial opinion by us is the recent Act of the local Legislature, by which suitors are debarred from having any *nisi prius* decision reviewed except at intervals of a whole year. And in the examination of the question whether such a denial, or at least delay, of justice is within the competence of the local legislature, principles must be laid down which no doubt deal with an important portion of the local legislation here within the past few years.

Mr. Justice Cooley in his treatise on Constitutional Limitations (page 195) says: "A judge, conscious of the fallibility of human judgment, "will shrink from exercising this power of declaring an act of the legis-"lature void, in any case in which he can, conscientiously and with a due "regard to his duty and official oath, decline the responsibility. * * "But when courts are required to enforce the law as it stands on two "statutes, one local, the other paramount, they must enforce the latter "whenever the local law comes into conflict with it." Elsewhere he says that "the jurisdiction is only to be undertaken with reluctance, and will "be left for consideration until a case arises which cannot be disposed of "without considering it, and when consequently a decision on the point "becomes unavoidable." (page 199) But when it becomes necessary to decide on the unconstitutionality the court cannot refuse to do so.

Mr. Justice Cooley's treatise did not reach Victoria until a year ago, but this extract describes very accurately the condition which this Court has actually pursued since April, 1879.

Having therefore noticed the greater part of the views pressed upon us by the Attorney-General, which in our opinion were not very important to be considered at all, and which we dismiss as not touching the real point at issue, we turn to examine the constitutionality of the impeached sections by the only test to which we can apply, viz: the British North America Act, the "paramount statute," to use Mr. Justice Cooley's words; and the only questions we can entertain are those stated by Lord Selborne in Regina *vs.* Burah, 3 Privy Council appeal cases, page 905, viz: "Is this thing which has been done legislation? Is it within "the general scope of the words which affirmatively give the power? Does "it violate any express condition or restriction in the creating Act (or in "any other Imperial Act) by which that power is limited?" I think these questions should be answered unfavorably for the constitutionality of the sections now impeached. The rule is stated to much the same effect by Mr. Justice Cooley (Constitutional Limitations, page 204.)

The impeached sections are section 28 and 32 of the local Act, 1881, chapter 1; section 28 is as follows:

"The Judges of the Supreme Court shall have power to sit together "in the City of Victoria as a full court, and any three shall constitute a "quorum, and such full court shall be held only once in each year, at "such time as may be fixed by Rules of Court."

And section 32 runs thus, so far as is material:

"The Supreme Court Rules, 1880, shall as modified by this Act be "valid * * and the Lieut.-Governor in Council shall have power to "vary, amend or rescind any of these rules or make new rules, provided "the same are not inconsistent with this Act, for the purpose of carrying "out the scope and aim of this Act and of the 'Better Administration of "Justice Act, 1878.' These rules need not be uniform but may vary as "to different districts in the Province as circumstances may require. And "section 17 of the Judicature Act, 1879, with respect to Rules of Court "shall continue to be in force, subject to such proviso."

(Section 17 of the Act of 1879 directs all Rules of Court to be made by Order in Council.)

These sections must stand or fall as they agree or disagree with the British North America Act, 1867. I do not know whether the Act, 1881, chapter 1, has been disallowed at Ottawa or whether it has been left to its operation. It is quite clear that if originally unconstitutional it cannot be in any degree confirmed by being left to its operation, which merely means the absence of any formal condemnation by the Governor-General's constitutional legal advisers.

I shall endeavor to show: 1st, that these sections deal with a matter, and in a manner, that is not either expressly or by reasonable implication, affirmatively placed within the power of the local Legislature. This I think can be established without going beyond section 92 and its subsections. But if we look at the rest of the British North America Act, I think it will also clearly appear: 2nd, that the impeached sections infringe the plain words of other sections of the British North America Act and are repugnant to its manifest intentions.

The only part of the British North America Act, so far as I can see,

which can warrant the recent local legislation is to be found in section 92 and two of its sub-sections.

Section 92 is in these words: "In each Province the Legislature "may exclusively make laws in relation to matters coming within the "classes of subjects next hereinafter enumerated, viz:

"Sub-section 13. Property and civil rights.

"Sub-section 14. The administration of Justice in the Province, "including the constitution, maintenance and organization of Provincial "Courts, both of Civil and Criminal jurisdiction, and including also Civil "procedure in those Courts."

It must throughout be borne in mind that by the immediately preceding section, 91, every topic of legislation was swept into the power—the exclusive power—of the Parliament of Canada (viz: the Crown, the Senate and Commons of Canada) except only such matters as by this Act—not by any one section of it, but by the whole Act,—are exclusively assigned to the local Legislatures. If, therefore, a conflict arises between any general words in section 92, and general words in any other part of the Act, or between express words in section 92, and express words in any other part of the Act, so that any matter which might otherwise have been supposed to be included in the terms of section 92 or its sub-sections, is also equally placed under Dominion control in some other part of the Act, and thus not given exclusively to the Province, then by virtue of the sweeping force of the words in section 91 the Parliament of Canada has sole cognizance of such matter. For it would be contrary to common sense to suppose that the extremely careful framers of this British North America Act intended to permit a joint authority in two entirely differently constituted bodies (the Parliament of Canada being composed of the Queen, Senate and House of Commons of the whole Dominion, and the local Legislature, consisting merely of the Lieut.-Governor and local House of Assembly), and that, too, at the very moment when they were taking pains to distinguish and separate them. And the express words of the second branch of section 91 shows that when any authority is conferred on the Dominion Legislature, it was intended to be an exclusive authority. We must also bear in mind that the matters enumerated in the sub-sections of section 91 are not to be looked upon as limiting the power of Parliament; and that on the other hand all the sub-sections in section 92 (so far as they are exclusive) are exceptions out of the otherwise universal grant to the Parliament of Canada in the first part of section 91.

The first thing to be observed upon section 92 is, that its object and intention as well as express phraseolgy is to confer a legislative power on a legislative body. The words of sub-section 13 and the first part of sub-section 14 are extremely comprehensive. If they stood alone; if "civil rights and the administration of Justice" were handed over to be dealt with by any one department of the Provincial Government, the grant would cover everything that can be done by any of the three branches of civil government, the legislative, the judiciary, and the executive. But the sub-sections do not stand alone; nor do they contain any words of grant. They are entirely governed and controlled by the operative words in the body of the section; and merely enumerate the topics upon which the grant is to be exercised. And the grant is to a purely legislative body, of purely legislative functions, "to make laws" in relation to civil rights and the administration of justice; and there is no grant here

to the local Legislature enabling them to exercise either judicial or executive powers or functions in respect of any of the enumerated topics.

In defining, asserting, ascertaining and protecting civil rights,—in administering justice, the share of the Legislature is probably the most important. But the Legislature has only a share in the work. A very important share in all this business belongs to the judiciary; a very important share to the executive alone; and it could not have been intended to give to the Legislature power to perform both judicial and executive functions; and at all events it has not been expressly given. No part of the administration of justice, probably, is more important than the safe custody of alleged criminals and the punishment of persons convicted. For these purposes the Legislature have authority to legislate—to provide that prisons shall be built and constables appointed. But they cannot carry out their own commands; they cannot contract for the building of a lock-up, or appoint a constable, or determine whether an accused person is guilty or whether a constable does his duty. These matters are clearly left to the Executive and to the Courts. The gift of power to legislate in relation to the administration of Justice, therefore, does not give to a legislature power to interfere in every particular involved in that subject; but only in those particulars which are the proper subjects of legislation. This may perhaps be made a little clearer by supposing a converse case. Suppose that the Courts of Justice in each Province were by the British North America Act charged expressly (as they are indeed most clearly charged impliedly) with the care of civil rights and the administration of Justice, would it for a moment be contended that that authorized them to *legislate* in reference to civil rights or the administration of justice? And still less would such a power be implied if they were directed to render all such judgments and exercise all judicial authority as may be required for the maintenance of civil rights and in reference to the administration of Justice. Nothing but judicial powers would be conferred thereby on the Courts. And so, I think, nothing but essentially legislative functions are conferred by section 92, which grants to a legislative body power "to make laws" in relation to civil rights and the administration of Justice. There might be somewhat to be said against this view if it reduced section 92 to a barren grant; if there were nothing left upon which the grant could operate. But this is by no means the case. The argument leaves to the local Legislature, fully and unimpaired, all essentially legislative functions in respect to all the matters enumerated in section 92; all matters of substantive law; all, surely, that could have been intended to be given to the Legislature of the Province. The management of public lands and works, a large part of taxation, the whole law of inheritance to real and personal property, the rights of creditors against the person and property of their debtors, of husband and wife, the law of juries and attorneys and numberless other matters are left to the local Legislature; executive and judicial functions, however, are not given, and therefore are expressly forbidden to them, even in regard to these topics.

The necessity, especially in a constitutional Government, of distinguishing between the functions of the Legislature, of the Executive and of the Judiciary, requires no comment. It is a necessity indeed which may be said only to exist in a constitutional Government; for if these functions be allowed to be usurped by any one branch, the Government will cease to be constitutional, and will be in reality a despotism;

whether vested in a Louis XIV., in a Venetian Council of Ten, or in a Long Parliament. And this may be one of the meanings of Lord Burleigh's apothegm, "That England can never be ruined but by a parlia-"ment." "Public liberty," says Blackstone (2 Stephen Blackstone, 493) "cannot subsist long in any State unless the administration of common "justice be in some degree separated both from the Legislative and the "Executive power." And Chief Justice Harrison in his luminous judgment in Leprohon's case insists on the importance of preserving the distinction (40 Upper Canada, 487).

As to the line of demarcation between the Legislature and the Executive it has been well observed by a distinguished writer (Doutre, Constitution Canada, page 104) that "in a constitutional Government the "Executive is merely the committee of management of the majority in "parliament." Differences of opinion, therefore, as to whether any particular exercise of authority belongs of right purely to the legislature or purely to the executive are not very likely to arise. And if any act of either should be called in question by the minority, as an encroachment on the other, the majority in parliament will generally sustain the action of their own committee, or be sustained by them, as the case may be. And this is especially probable in a single chamber constitution. But it is not necessary here to inquire into the boundaries between the functions of the legislature and of the executive. We shall endeavor, however, to distinguish to some extent the functions of the Legislature and of the Judiciary, and in the first place consider the subject of procedure, which, in the case of a Superior Court, is generally allowed to be under the control of that Court. But then, what is procedure? what is not?

It is clear that a Court of Justice ought not, under color of regulating practice, or procedure, either to make a new law, or repeal an old law, affecting a suitor's rights in anything which may be the subject matter of a suit. But the forms, and the times, and the proofs to be observed and adduced in claiming those rights are matters for the Court to determine; unless the power be taken away. These constitute, I think, what may be called the procedure of the Court. Even such a matter as the limitation of actions in point of time is part of the *modus procedendi* (Story's Conflict of Laws, page 577, section 99, and the authorities there quoted). So is evidence (Taylor's Evidence, section 41). And as to moulding the commencement of actions, that was so completely in the hands of the Courts, that each had its own forms of writs; and it was in order to bring about uniformity of practice that the Imperial Parliament from time to time interfered in all these matters, as it had a right to do by virtue of its sovereign authority. But no legislature not sovereign can interfere with or alter the procedure in a Superior Court unless special authority to do so be conferred on it by the Sovereign, *i.e.*, here, by the Imperial Parliament. This power of Superior Courts is, I think, undoubted. It is called a common law right (3 Chitty, Statute 505, and the authorities there quoted, and *re* Story 8, Exch. Rep. 198). When the Imperial Parliament has intervened, it has generally been cautious not to cast doubt upon the power of the Court (as in the Common Law Procedure Act, 1852, chapter 76, section 223, *sub finem*). But this leaves the question still open, whether any particular matter is matter of procedure, or of substantive right or law.

The question was very clearly raised and discussed, but not, I think, decided, in Poyser *vs.* Minors, (7 L. R. App. Cases, page 331). There

the proper quorum of County Court Judges had established, as a rule of County Court procedure, Rule 9 of the schedule to the Judicature Act, 1873, (giving a very stringent effect to all judgments of nonsuit). The majority of the Court of Appeal gave effect to that rule of court, treating it as concerning a matter of procedure merely. Lord Justice Bramwell dissented, thinking that this was a matter of substantive law, and so, not within the competency of a quorum of County Court Judges to establish. The actual decision in Poyser *vs.* Minors could perhaps be supported in either view. If the rule there discussed were matter of procedure, then the County Court Judges had power to establish it. If it were substantive law, then being in fact a provision of the schedule of the Imperial Judicature Act, 1873, which by section 69 is part of the Act, it became by section 91 binding on all County Courts as well as on the High Court, whether they adopted it by general order or not. The majority of the Court in Poyser *vs.* Minors, and Lord J. Bramwell himself in Palles *vs.* Neptune Insurance Company (5 C. P. D. 39), however, clearly expressed the opinion that the phraseology in the Judicature Acts of 1873 and 1875, amounts to a legislative declaration that all the topics treated of in those schedules are matters of pure procedure, and on that account, within the cognizance of the Judges to regulate.

"'Practice,' in its larger sense," says the lamented Lord J. Lush in delivering the judgment of the Court in Poyser *vs.* Minors (page 333), "the sense in which it was obviously used in the Act of 1856, like 'pro-"cedure' which is used in the Judicial Acts, denotes the mode of pro-"ceeding by which a legal right is enforced, as distinguished from the "law which gives or defines the right, and which, by means of the pro-"ceeding. the Court is to administer; the machinery, as distinguished "from the product." If it be lawful for me to put a gloss on the words of that distinguished Judge, I should be inclined to say that the "Rules of Court" with which we more immediately have to deal, do not even mean the machinery, but are merely directions for using the machinery, including announcements by the managers of the department, of the times at which the machinery may be employed. "The orders and rules "under the Judicature Acts 1873, 1875, are matters of procedure, and "are not intended to alter the law or the rights of parties," says Lord Justice Bramwell delivering the judgment of the Court of Appeal in Palles *vs.* Neptune Ins. Co., (5 C.P.D., see page 41.) The words "legal "right," used by Lord Justice Lush, and "law," and "rights of parties," used by Lord Justice Bramwell, mean clearly what Lord Justice Lush terms a "product,"—something quite different from the "right" which every suitor has to the benefit of the "machinery," or of the directions for using the machinery; though, owing to the poverty of language, the same word "right" may be applied in both cases. And it seems clear that it is only the "product" mentioned by Lord Justice Lush which comes within the meaning of section 92 of the British North America Act, and which the local Legislature has power to deal with. If we had now to decide that point we should probably follow those Judges. But it is not necessary to go quite so far. The only point actually arising for decision is as to the alleged restriction in section 28 on the sitting of a full Court for a whole year, and the attempt to give to the local Executive authority to appoint our sittings. It is more important to observe that what the Imperial Parliament has done is no sure test of what a local legislature may do:—and that not

even the Imperial Parliament has ever meddled with the point of procedure now in question, viz: the fixing the days or intervals of holding full Courts, or as they are termed in the English Statutes, Divisional Courts, for the review of *nisi prius* decisions. That has always been left to the discretion of the Judges to fix from time to time according to the requirements of the suitors and the state of other business before the Courts. And accordingly it is notorious that such announcements are made from the Bench from day to day as occasion requires. No legislature, nor any other body than the Judiciary, actually engaged in the conduct of business, can arrange such matters with tolerable propriety or convenience to the public. Whatever may be said of some topics, this, at all events, is pure procedure, and essentially of Judicial cognizance. It is not a legislative function at all, any more than the adjournment of a part heard case. It consequently is not included in any general gift of legislative power. And, therefore, it is not conferred by the gift to a legislative body of "a power to make laws "in reference to civil rights and the administration of Justice." And not being within the power of the Legislature to deal with it themselves, they cannot transmit any authority in that behalf to any other body, apart from the doctrine in Regina *vs.* Burah, which I shall examine presently. If the Imperial Parliament may and does from time to time thus interfere beyond its proper legislative functions, that is by virtue of its sovereignty. No derivative legislature may do so unless especially authorized in that behalf. Mr. Justice Comstock says: "Aside from "the special limitations of the Constitution" (*i.e.*, in our case the British North America Act), "the legislature cannot exercise powers which are "in their nature essentially executive or judicial." "We are only at "liberty," says Cooley, "to liken the power of State Legislatures to that "of the Imperial Parliament when they confine their action to the exercise of legislative powers; and such authority as is in its nature either "judicial or executive, is beyond their constitutional power" (pages 108, 110—unless, I would add, authority to overstep ordinary legislative limits be expressly given in and by the creating Statute. Cooley is speaking of the States legislatures, who have received, he says, certain powers from their Sovereign, the people; but his remarks are, I think, exactly applicable to the provincial legislatures created by the British North America Act, who have received certain powers from their Sovereign, the Queen in Parliament. And he says that a grant of legislative authority, though as plenary as that of the Imperial Parliament while exercised on matters essentially of legislation, does not enable the local Legislature to extend its hand into matters properly judicial, although the Imperial Parliament might do so, and might by express words have authorized them to do so, if it had seemed proper. The Imperial Parliament, in its absolute sovereignty, can neglect at will fundamental principles. Further on he says, page 211: "When only legislative "power is given to one department and only judicial power to another, "it becomes quite unimportant that the legislature is not expressly forbidden to try causes, or the judiciary to make laws. The assumption "of judicial functions by the legislature is in such case unconstitutional "even though not expressly forbidden; for it is inconsistent with the "provisions which have conferred on another department the powers "which the (local) Legislature is seeking to exercise." It must be admitted that section 92 confers expressly nothing other than legislative

powers. The words are clear: a "power to make laws;" and nothing else.

But if this view be as far wrong as it seems to me to be clearly right; if the appointment of the days for holding a full Court be a matter of substantive law, and so requires to be determined by a legislative body, and if that body so entrusted by the British North America Act be the local Legislature, then the determination of it is an act of pure legislation, which the sections now impeached attempt to hand over to another body, viz: to the Lieut.-Governor-in-Council. And this according to the dicta in Regina vs. Burah is clearly beyond the limits of their powers. It would be "to create a new legislative power not created nor author-"ized by" the British North America Act.

That case was very much relied on by the Attorney-General as a complete justification of his attribution of "omnipotence" to the local Legislature, and he repeatedly cited Lord Selborne's expressions at the foot of page 904 of the report, viz: "But their Lordships are of opinion "that the doctrine of the majority of the Court (below) is erroneous, and "that it rests on a mistaken view of the powers of the Judicature and "Legislature, and indeed of the nature and principles of legislation. The "Provincial Legislature has powers expressly limited by the Act of the "Imperial Parliament which created it, and it can of course do nothing "beyond the limits, which circumscribe these powers. But when acting "within these limits it is not in any sense an agent or delegate of the "Imperial Parliament, but has and was intended to have plenary powers "of legislation as large and of the same nature as those of the Imperial "Parliament itself." But these words, in which I perfectly agree, and which would be binding on me even if I could not concur in the reasoning, appear to me to have been completely misunderstood here. They are, in fact, completely conformable with and lend the highest sanction to the principles I shall lay down. But in order to understand the passage, it really must not be cut off from the immediately preceding and succeeding context at the top of the same page and at the top of the next. Lord Selborne after saying (page 904) that the Court below had examined whether the clause there impeached was within the competence of the Indian Legislature on the principle "*delegatus non potest delegare*," says, the passage just quoted, "That is not at all a principle to apply. A derivative legislature is not a delegate of its creator; but has, within its limits, as plenary powers as its originator." But then he proceeds immediately to say (page 905): "We quite agree that the Indian Legislature could not by any form of enactment create in India and arm with general legislative authority a new legislative power, not created nor authorized by the Councils Act" (the Imperial Act creating the Indian Legislature)—not on the principle *delegatus*, etc., but because that power of creating a subsidiary legislature had not been granted by the Imperial Act, and the Indian Legislative committee would have been going beyond their limits if they had attempted to create such a thing. Now that is precisely the case in the British North America Act; it confers on the local Legislature no power to create a new legislature, nor contemplates legislative powers being handed over to the Lieut.-Governor-in-Council. And then in page 905 Lord Selborne goes on to say, "Nothing of that "kind has in our opinion been done or attempted here," and states what, in the opinion of the Privy Council actually had been done; viz: the legislation and all its provisions were complete; and a law, pure and simple, was

handed over to the Lieut.-Governor to say in what territorial districts of his territory it should be applied, and at what date; as soon as these were fixed, everything else, that could be called legislation, had been fixed and prepared for him beforehand. But it is clear from the expressions in page 905, quoted above, what the opinion of the Privy Council would have been, if the impeached law had handed it over to the Lieut.-Governor to make laws in any district of his presidency, as well as to fix the times and districts in which the laws so to be made by him should come into effect. This was the only question raised and decided in Regina *vs.* Burah. The effect of the other sections of the impeached statute was not called in question (page 895, page 903) nor taken into their Lordship's consideration. The Privy Council held that what had been done in this impeached part was merely conditional legislation, not an attempt to create a distinct legislative body. See also, the expressions of Chief Justice Hagarty in Regina *vs.* Hodge (46 U. C. Q. B. O., see page 151, 152.)

As to this first point, therefore, the argument on section 92, sub-sections 13 and 14, taken alone, stands thus: This power of fixing the sittings of the full Court is matter of pure procedure, *i. e.*, of merely judicial cognizance; and, therefore, the local Legislature has no authority over it at all—it never was given to them. But if that view be held erroneous, and if this power be deemed a matter essentially legislative in its nature, then the local legislature must provide for it themselves; they have no authority to create a new legislature to make provision for it. And this latter conclusion, might but for one thing, have been deemed to have been the conclusion of the advisers of the legislature a year ago, when they inserted in that section 32 of the Act of 1881, c. 1., the words confirming and giving a statutory force to all the "Supreme Court rules, "1880." These rules had, theretofore, stood on the authority of the local Executive, claiming to be duly empowered thereto by section 17 of the Act of 1879. It might almost have been conjectured that it was in 1881 suspected by the local Government that this section 17 was *ultra vires*, according to Regina *vs.* Burah, were it not that the very same error is committed over again in the very same section; and even a grosser error; for in that very section 32 the legislature gives power to the executive not only to make laws (if these rules of Court are laws) but to repeal and alter what has just been decreed to be statutory law.

The Attorney-General, however, further insisted that the Supreme Court here fell within the description in the latter part of sub-section 14, viz: "including the constitution, maintenance and organization of "Provincial Courts, both of civil and criminal jurisdiction, and including "civil procedure in those Courts," and he claimed under those words full and express authority to deal with civil procedure in all Courts, including the Supreme Court. But it seems as clear as words can speak, that the procedure thus handed over to be provided for (not, I think, to be set forth in detail) by the local Legislature, is the procedure in "those" Courts, viz: in the Courts mentioned in the immediately preceding words; the only Courts mentioned in the whole 92nd section; Provincial Courts, that is to say, in the strictest sense of the term, which the local Legislature is by that sub-section authorized at any future time to "constitute, maintain and organize," and by sub-section 4 of section 92 is specially empowered to pay. It seems perfectly impossible that this description can mean a Court which was fully constituted not by the

Province at all, but long before the Province came into existence, and having that constitution secured to it by section 129, (British North America Act) till varied by Dominion legislation; a Court, of which the Judges are appointed and maintained and removable by the Dominion authorities alone (sections 96, 99, 100 British North America Act).

The introduction of the latter part of this sub-section 14 does not seem to assist, but greatly militates against, the Attorney-General's contention, that the first words alone "power to make laws in relation to "the administration of Justice" were intended to confer absolute power over all Courts in British Columbia, together with their procedure and everything therewith connected. For if such had been the intention of the first grant, nothing can be weaker than to add, "and this grant shall "include the constitution, maintenance and organization of "Provincial Courts," and then still further to add: "and shall also "include civil procedure in those Courts,"– showing that a power "to "make laws for constituting, maintaining and organizing Courts" was not thought enough of itself to carry a "power to make laws in reference "to procedure" even in "those" Courts, without special words; and that such an express grant was necessary in order to confer any power to legislate on the procedure even in those inferior Courts. This seems quite incompatible with the Attorney-General's contention, that no express words whatever were necessary to confer absolute power over every point of procedure in the Supreme Court. The section, so far as sub-sections 13 and 14 are concerned, amounts to this: The local "Leg- "islature may make laws in reference to property and civil rights, and "also to the administration of Justice; and those laws may include laws "for the constitution, maintenance and organization of Provincial Courts "(*i. e.*, Courts of the Province after Confederation); and may include "provisions in reference to civil procedure in the Courts so constituted, "maintained and organized." In fact it seems clear that the Courts here contemplated must be subordinate to the Supreme Court. Otherwise, if of co-equal authority, they would be, at the least, superior Courts, and so by sections 96, 99 and 100 the Judges would have to be appointed and maintained and removed when necessary by the Dominion alone; which, according to the views of the Judges in Valin *vs.* Langlois, (3 Canada S. C. R. 1) would make them officers of Canada, and so by the British North America Act itself (section 129) under the control of the Parliament of Canada as to their jurisdiction, procedure and everything else, and not under the local Legislature; which is contrary to the hypothesis, and absurd. These Courts, therefore, contemplated in the latter part of sub-section 14 are inferior Courts, including most probably all such Courts as Courts of Justices of the Peace, Coroners, Gold Commissioners, Sheriffs' Courts, etc. And it may well be supposed that when such local Courts suggested themselves to the framers of the British North America Act as possible, the question arose, "what is to be done "about procedure in these Courts? In Superior Courts, the Judges, we "know, have power to make rules; but in these Courts, who shall settle "their practice?" and Parliament said, "Let the local Legislature decide that."

The case would stand thus, therefore, on the bare words of section 92, sub-sections 13 and 14, and without considering Lord Selborne's second test, "Is there anything in the rest of the British North America "Act incompatible with the evidence of this power in the local Legisla-

"ture?" And the answer to this is, I think, not far to seek. It is not only extremely clear on the Act itself, but has in effect been judicially settled by the ultimate authority in Canada, approved by the Judicial Committee of the Privy Council.

The steps leading to this conclusion are these: By section 96 the Judges are to be appointed by the Governor-General. By section 99 they are removable by the same authority, on the address of the Senate and House of Commons. By section 100 they are wholly maintained by the Parliament of Canada. The Province has no voice in any of these matters. How can it be said that the Judges are exclusively Provincial officers? And if not exclusively Provincial, then they are officers of Canada. "If an officer is employed by the United States," says Chief Justice Marshall, "he is an officer of the United States." (United States *vs.* Maurice, 2 Brock, see page 102). The Governor-General directly represents and, so to speak, personates the Queen. The Lieut.-Governor, from whom strictly Provincial appointments emanate, only represents the Governor-General. The effect of the appointments is different accordingly. Surely the Judges of the Supreme Courts, selected, commissioned and paid, and removable by Canada, are employed by Canada, and so, officers of Canada. On that very ground the Province has abandoned their claim to tax our incomes; and the Dominion Executive have instructed the Provincial Executive that they alone claim the right of disposing of the judges' services, as by imposing other duties; and to temporarily dispense with their services, as by granting them leave of absence. These matters are not conclusive evidence of the meaning of the Act; but they are very cogent evidence; deliberate opinions of high Executive authority; repeatedly made by the Dominion, and submitted to by the Province; and what is most important, judicially approved (so far as the question arose) in Valin *vs.* Langlois. In fact, but for the course of British Columbia legislation for the last 3 or 4 years, every authority, both of the Dominion and of the Province, would seem to have been entirely of one mind ever since 1874, that the Judges of the Supreme Court in any Province are Dominion officials. The consequences are not far off. By section 129 (upon the importance of which in this argument the Jugdes rely in Valin *vs.* Langlois.) "All laws in force in Canada, Nova Scotia or New Brunswick at the "Union, and all legal commissions, powers and authorities, and all officers "judicial, executive and ministerial, existing therein at the Union, shall "continue in Ontario, Quebec, Nova Scotia and New Brunswick, respect-"ively, as if the Union had not been made, subject nevertheless ..... to "be repealed, abolished or altered by the Parliament of Canada, or by "the Legislature of the respective province according to the authority of "the Parliament or of that Legislature under this Act."

Now it is perfectly undoubted that the Supreme Court of British Columbia, and two of its present judges existed in the Colony of British Columbia at the time of the Union. They, therefore, continued to exist in the Province since the Union; and so do their commissions, their powers and authorities as if the Union had not been made. The change of name from "Canada" to "Quebec" and "Ontario" in the above sections is suggestive. It is not that the former Provincial Courts, Judges, etc., in the old sense of "Provincial" are to become "Provincial" in the new sense. On the contrary, the former Courts and Judges with all the powers and jurisdiction over all matters, both in section 91 and section 92,

92, in short, as they existed in the completely autonomous provinces, are to be continued after the Union in the same geographical limits, though they are now called "provinces" in quite a different sense. All the Judges appointed since confederation are by their commissions expressly to have all the powers and privileges of the other Judges. Among the powers and authorities which the Judges undoubtedly had under the British Columbia ordinance of 1869, confirmed by the British Columbia ordinance of 1870, are all the powers and authorities (which as to rules of procedure are extremely full) of the former Courts of Vancouver Island, and of the Mainland, and of the Judges thereof, (1869 Merger Act section 11). And besides this, the Act of 1869 gives authority to the Chief Justice alone "from time to time to make all such orders, rules and "regulations as he shall think fit for the proper administration of justice "in the said Supreme Court of British Columbia." And this is confirmed, as I have said, by an ordinance of the ensuing year, immediately before confederation. All these powers and authorities the section 129 preserves inviolate, until abolished, repealed or altered by the Dominion Legislature or the Provincial Legislature, according as either shall have authority under the British North America Act. But the Judges are Dominion officers, over whom the Dominion Executive and Parliament have between them, by sections 96, 99 and 100, the fullest authority, and over whom the Provincial Executive and Legislation have no authority at all discoverable by the Judges in Valin *vs.* Langlois. The powers and authorities, therefore, by the British Columbia Colonial Ordinance of 1869 remain intact at this day subject to the powers by section 129 expressly reserved to the Dominion Parliament.

I do not think it can be argued, at any rate it was not argued, that the distributive words at the end of section 129 have reference to the subjects handled by the Courts, officers, &c, and not to the Courts, officers, &c., themselves. In the first place the words of the statute are perfectly plain, and contain no reference to any particular topics, the passive subjects, *i. e.*, enumerated in sections 91 and sections 92, but only to persons and their powers, active agents, owing allegiance to the one legislature or the other. And when construed of such, it is perfectly reasonable and clear. If it be attempted to be applied to the enumerated topics in section 91 and section 92, it leads instantly to quite absurd confusion. It would provide for instance that the Dominion Parliament alone had power to legislate concerning the procedure in trying a question in the Supreme Court here concerning the postoffice, or shipping, or currency, or any of the matters in section 91, or rather, not expressly mentioned in section 92; but that in trying a question on any of the subjects enumerated in section 92, the Provincial Legislation is to have power to determine the procedure. And we should probably have the Dominion Parliament enacting (if it thought fit to legislate on such a topic) that a Full Court might consist of two Judges, and should sit whenever required by the business of the suitors, and on such notice as it should think proper; and the Provincial Legislature declaring that it must consist of three Judges or more, and must not sit oftener than once in a year, or, as was put in argument, once in five years, and at a time appointed by the Executive. Nay, we should have greater confusion still, and indeed, absolute contradiction. For as the Legislature having authority may under section 129 go so far as to abolish these former courts, it is clear that (if we are to ascertain the respective authority by reference to the enumer-

ated topics in sections 91 and 92) we might have the Dominion Legislature keeping this Court on foot for determining all questions of bankruptcy, currency, &c., and the Local Legislature abolishing it so far as regards all questions of inheritance, of legitimacy, or of civil rights generally. And the Local Legislature are to have power to do all this, though they are to have no voice in the removal of a single Judge (section 99). It is in my opinion improper to force the words of a statute out of their natural meaning with the sole result of introducing confusion and contradiction. Moreover we must not forget the clear words of section 91. Whatever is not *exclusively* given to the province, falls wholly to the Dominion. And even according to the forced view of the latter part of section 129, which I have been endeavoring to indicate, it is at all events quite clear that power over the Supreme Court and procedure therein would not thereby be exclusively given to the Province. Therefore, by section 91, it is exclusively given to the Dominion Legislature.

And with this view agrees also section 130, which is to be taken in connection with the concluding words of section 129 which it immediately follows; being in *pari materia*, and, I think, intended to explain them: "Until the Parliament of Canada otherwise provides, all officers "of the several Provinces,' [*i. e.* before confederation] "having duties "to discharge in relation to matters other than those coming within the "classes of subjects assigned exclusively to the legislatures of the Pro- "vinces" [after confederation] "shall be officers of Canada, and shall "continue to discharge the duties of their respective offices as if the "Union had not been made."

The Attorney General treated this clause very briefly, dismissing it as quite irrelevant, though I think even if it stood alone, it would suffice to dispose of the whole case. He said, as well as I could follow him, that it was intended to apply only to officers after confederation whose duties were confined exclusively to matters outside of sub-section 92, 93. But it is evident that this is not the natural meaning which would be put by a person of ordinary understanding on section 130. And an Act of Parliament *loquitur ad vulgas*. In fact, in order to support this meaning some word like "merely" or "solely" must be introduced, and the tenses employed entirely disregarded. "Having duties" means properly "now having," *i.e.* at the time of passing the Act, though it might mean "who shall at any time have." But the terminating words "shall con- "tinue as if the union had not been made" shows clearly that the section is speaking of officers existing before the union, *i.e.* in the "Provinces" while still autonomous, and therefore of officers who might well have duties over many matters both in section 91 and also in section 92. As to these officers a difficulty, it was foreseen, might well be felt, whether they were to fall under the authority of the Dominion Parliament or of the Local Legislature, under the distributive words at the close of section 129. Thereupon this section 130, following naturally on the last words of the previous section, is obviously intended to meet that difficulty and explain the position of these officers with dual duties. They shall be officers of Canada. The construction suggested by the Attorney General, besides the objections pointed out, would lead to this consequence, that the framers of this treaty of confederation, as it is not improperly termed, thought it worth while to provide for a case which was perfectly clear, and omitted to provide for a difficulty which must have been immediately present to their minds; indeed, forced on them by the

concluding words of section 129. There could be no difficulty, in the case of officers whose duties were purely of Dominion cognizance, though locally dwelling and working in a Province. In some Province they must dwell, and work, if they were to dwell and work in Canada at all. The only difficulty that could arise was in the case of officers whose duties partly concerned Canada generally, partly the Province (the statutable Province) alone. This, however, according to the Attorney General escaped the notice of the negotiators; and they introduced a merely useless proviso. Useless, even for the Attorney General's argument; for on no possible construction can it be supposed that section 130 hands over any officer at all to the Local Legislature, which is the proposition he has to establish. This proviso, section 130, even as the Attorney General reads it, certainly gives to the Province no exclusive power over any officer or thing whatever.

There is indeed a short sub-section in section 92 which the Attorney General did not think it necessary to discuss, but which seems wholly irreconcileable with his position that the Supreme Court Judges are merely provincial officers. I mean the 4th sub-section. "The Local "Legislature shall have power to make laws in relation to the establish-"ment and tenure of provincial officers, and the appointment and pay-"ment of provincial offices." But by the almost immediately following sections of the British North America Act, it is the Dominion authorities which have to appoint, remove and pay the Judges of the superior Courts. If these Judges are provincial officers, it seems to follow that notwithstanding the words of the sub-section 4, the care (and the duty) of legislating concerning the salaries, etc., of provincial officers is not, on the whole Act, exclusively reserved to the Local Legislature. And without going so far as to say that that care and duty, (including provision for the salary of the Attorney General himself), is therefore wholly cast upon the Dominion Parliament and Government, it seems clear that we should have here, in almost consecutive sections, a very remarkable contradiction if the Act intends "Provincial officers" to include Judges of superior Courts. A similar incongruity, though not leading so directly to a *reductio ad absrudum*, arises on sub section 8 of section 91, reserving it to the Dominion Parliament exclusively to provide for fixing and paying the salaries of all Dominion officers; surely intending by that term to include the judges who are spoken of 4 or 5 sections further on. There certainly is no express power reserved to the Dominion Parliament to legislate for providing the salary of any provincial officer, *eo nomine*. In fact, if the Judges of the superior Courts are taken to be purely provincial officers, every section of the Act referring either to Provincial or Dominion officers, has to be forced, and becomes anomalous. If held to be Dominion officers, the construction immediately becomes natural and harmonious.

All these five sections, viz: 96, 99, 100, 129, 130, are evidently founded on a fundamental principle of the British North America Act; (viz.) that while local legislation, properly so called, *i. e.*, concerning strictly local matters and rights, was to be handed over absolutely to the respective provinces, all authority over matters of general importance to the Dominion was to be retained by the Dominion Legislature. And in order to safeguard these objects, and ensure that this division of functions should be observed, all the Superior, District and County Courts in every province after Confederation, (*i. e.*,) in the whole Dominion, were

to be presided over by officers of Canada, and to be subject to the control of the legislature and executive in Canada,—Courts inferior to these, if created by the local legislature in any province, being left to be dealt with by the legislatures which called them into existence.

And with this seems also to agree section 94, which provides that "after the passing by parliament of an Act for Uniformity and civil "rights, etc., and procedure throughout the Dominion" (confirmed and "adopted by the provinces as therein mentioned) "the power of parliament "to make laws in respect of such matters shall be unrestricted." That is to say, not that parliament shall then for the first time have power, but that the existing restrictions shall then for the first time be removed. There seems to be, as I read the British North America Act, one restriction on the interference of parliament, and only one, (viz.,) section 129, confining it to Courts held before officers of Canada; and section 94 seems to allude to this. I do not say that this is the only possible grammatical sense of section 94, but this interpretation supports and is supported by many other sections of the Act, whereas any other interpretations seems to raise anomalies. For the language of section 94 and of many other sections seems hardly compatible with the notion that until the passing of such an Act as therein referred to, parliament is to have no power whatever to legislate concerning a single court in the whole Dominion; and that by simply refusing consent to any contemplated Act, any province could for ever condemn the Dominion Parliament to perpetual impotency. This would soon compel parliament to exercise its undoubted power of extinguishing all the superior courts in the Dominion by simply leaving them to perish; and then it would fall back, probably, on the power of creating new courts under section 101; but whether these would meet the difficulty, *quære.*

There was one suggestion made by the Attorney General which I had almost forgotten. It appears to me to be very immaterial; but as he insisted on it at some length, I may mention some of my reasons for neglecting it. It was that the "organization and maintenance" of a court meant something more than the appointment and payment of the Judge or Judges of the Court; that it included among other things the appointment and maintenance of all the officers of the Court, registrars, etc., the providing courthouses, chambers, etc., preparations for trials of crimes, juries, etc., all which are now provided by the province and at provincial expense; and thus, that the Supreme Court of British Columbia has never, since Confederation, been wholly organized or maintained by the Dominion, who have undertaken merely the nomination and the salaries and allowances of the Judges. I am very much of the Attorney General's opinion as to one part of his suggestion. I have always thought that the Registrars and officers were part of the Supreme Court, and ought to be designated and maintained by the Dominion authorities alone, both on the words of the British North America Act and on the policy of the thing. I have often pressed my views on the Dominion Government, ever since 1872, and I have never been satisfied that my arguments were met by any attempt at argument on the construction of the Act. I was not likely therefore to have omitted this consideration. But it does not seem to govern the present question. Whether the expenses of the Supreme Court of British Columbia are, in the fullest sense of the word "Courts," wholly defrayed by the Dominion or not, it cannot be said that it is a Court, "constituted, maintained and organized" by the

province within sub-section 14. The consideration that the Registrar has hitherto been paid by the province cannot affect the position that the Judges at least are, according to the reasoning in Valin and Langlois, officers of Canada, and subject as such to the authority of the Parliament of Canada; and therefore to that parliament alone, for they cannot be subject to two different legislatures at once. It cannot affect the direct and express provisions of section 129, that all the powers and authorities which the Judges (who at all events are "judicial officers") had before Confederation, are to continue after Confederation, until altered by the Parliament of Canada; nor those of section 130, that we are to "continue to discharge our duties as if the union had not been made."

These are the principal matters which have suggested themselves to me in considering the recent Acts of the Local Legislature. Some of the points on which I have ventured to rely are, I have been told, new; not put forward in any of the text books or reported cases; indeed, rather opposed by the dicta in some reports; (e. g.,: 1st. The proper force now for the first time claimed for the word "those," in sub-section 14 of section 92. (2nd.) The force claimed for the word "exclusive" in section 91, and that the exclusive grant to the province must appear from the whole Act, not from any particular section. (3). The restriction of the grant in section 92 to strictly legislative functions, so that no grant to the local legislatures is thereby conveyed or intended to be conveyed of functions essentially executive or judicial. (4th.) The application of Lord Selborne's dicta in R. *vs.* Burah in this way, that if the clauses now impeached deal with a matter essentially judicial, they are not at all within the powers of the local legislature; if essentially legislative, the power cannot be transferred. (5th.) The application of the "exclusive grant" notion to the concluding words of section 129, so that if the Dominion Parliament have thereby any power, the Local Legisiature have none. (6th.) The distinction I have endeavored to draw between the different senses in which the words "Province," "Provincial," are used; and other instances, perhaps. But the question is not whether these distinctions are new, but whether they are true; and I think they are; and that they quite accord with the principles of the decision of the Supreme Court in Valin *vs.* Langlois, (3 Canada Supreme Court R. I.), and may even, I venture to hope, explain away some carpings and anomalies which have been objected against that decision.

We were reminded that we could not condemn these sections as unconstitutional, merely because we thought them inexpedient; that the question of policy was wholly for the legislature. That is undoubtedly so; if the local legislature have the power, they alone must judge of the policy. But I cannot refrain from pointing out that recent legislation seems to aim not at the administration but at the non-administration of justice, and affords a clear proof of the wisdom of the framers of the British Norih America Act when they removed these matters, as I think it has removed them, from the control of the Local Legislature. The effect of the whole scheme is such, that if the Judges of the Supreme Court had of their own mere motion announced the resolution to do what the recent legislation authorizes, and in some respects, attempts to command; if we had taken up our residences, one in Queen Charlotte Island, another at Joseph's Prairie, a third on the Semilkameen and the other two at Kamloops and Richfield, and further announced

that we would not listen to siutors seeking a review if a *nisi prius* decision, save at intervals of 12 months, it seems highly probable that the indignant and injured suitors might readily have procured addresses from the Senate and House of Commons to remove us from offices, the duties of which it might be truly said we had practically renounced. Not, however, on account of this unreasonableness, nor because it contradicts the text of Magna Charta (an Imperial Act); but for the reasons I have alleged, I think that the provision in section 28 of 1881, chapter 1, forbidding a Full Court to be held save at intervals of a year; and section 32, chapter 1, 1881, and section 17, 1879, chapter 20, so far as they assume to create rules of procedure in the Supreme Court, or to authorize any other body of men to make such rules, are unconstitutional and void.

Mr. Theodore Davie for the plaintiffs contended that the whole of additional rules of Court, the so called "Amendments" must be condemned, on this ground: They are founded, in the main, and almost in every detail also, on the words and spirit of section 32 of the Act, 1881, (viz.) with the paramount object as expressed in that section, of carrying out the Local Statutes of 1878 and 1879 with reference to the districting of the Judges of the Supreme Court. That those Acts are all *in pari materia* with the Acts of 1881 c. 1, and therefore must be read together: (Waterlow *vs.* Dobson 27 L. J. Q. B. 55, and sec. 2 App. Ca. L. R. 762), that they are eminently and flagrantly unconstitutional; and that these "amend-"ments," made avowedly in order to carry out unconstitutional Acts, an object to which the rights of the Dominion and the convenience of private suitors are alike sacrificed, must be declared to be of no effect. Mr. Theodore Davie further urged that an Act of the Local Legislature may be declared void, judicially, not only for direct conflict with or transgressions of the British North America Act, but for any obvious repugnancy to or hindrance of its intention; according to the observations of C. J. Harrison in 40 U. C. 488, and Hawkins *vs.* Gathercole (1 Deg. M. and G. 1). And, without in the least disputing the power of the Local Legislature to divide the Province into such districts as they may think fit (the term "district" since confederation seems unimportant) and to appoint and maintain in each district such Judge or Judges as they may choose, and who may be able and willing to serve (persons under other engagements would probably require in the first place the sanction of their employers) and to confer on their new courts such jurisdiction as they pleased (subject always to the review of the Supreme Court) it is of course obvious that there are many grounds on which divers clauses of the "Judicial Districts Acts" may be impeached. They may be said to be directly in the teeth of section 129. Can anything, it may be asked, be more clear and express than section 96 of the British North American Act,—"The Governor General shall appoint the Judges of the Superior "District and County Courts in each Province"? Can anything be a clearer infraction of that provision than section 3 of the Local Act, 1878, which says that after that Act comes into force, the existing County Court Judges shall no longer preside in the County Courts, and that certain other designated persons shall perform all the duties of the County Court Judge? "An office," says C. J. Marshall, cited approvingly by C. J. Harrison (40 U. C. 491), "is a public charge or employment He "who performs the duties of the office is an officer. If employed by the "United States he is an officer of the United States." It may well be

argued, that if the Local Legislature can, notwithstanding the above section, arbitrarily forbid any one class of the officers there mentioned to perform the duties of his office, and command such person as they may choose to perform these duties, they may equally displace and appoint substitutes for them all, including the Supreme Court Judges. If these assumptions are legal, it would seem, as the Attorney General alleged, that the Local Legislature is really omnipotent; and it is difficult to see why it should not with equal authority depose the Lieutenant Governor and appoint some other person to perform his duties. It is true, by sections 58, 59 and 60 of the British North American Act, the Lieutenant Governor in each Province is to be appointed by the Governor General, removable by the Governor General, and paid by the Parliament of Canada. But these are precisely the authorities who appoint, remove and pay the Judges of the Superior, District and County Courts in each Province (District Courts in these sections mean courts constituted before confederation). Indeed it might be argued that the position of the Lieutenant Governor was weaker than than that of the Judges of Supreme or County Courts, for these are protected against the efforts of the Local Legislature by a special clause, section 129, whereas the Lieutenant Governor (the office being previously unknown) has no such protection. Then as to the indirect unconstitutionality of these Acts, from their intention, and effect, Mr. Davie's argument was, if possible, stronger. The suitors have a right to the attention and care of all the Judges, in the consideration of the laws, whether made by the Dominion or by the local legislature. The isolation of two or more Judges in distant localities where they never can have any opportunities of hearing or entering upon any legal argument not only tends to depreciate their judicial power by non-user (Lord Eldon used to say that no man was so good a lawyer at the the end of the long vacation as he was at the beginning of it) but to deprive their colleagues also of the inestimable advantage of full and confidential discussion; and so tends to disable the whole Bench. For every Judge in turn may be thus banished. It deprives the suitors of the advantage of having their cases decided by the absentees. We are even now deprived of the presence of our colleague, Mr. Justice McCreight. Indeed if there were any difference of opinion between the Judges now in Victoria that absence would have rendered further delay necessary, as we certainly should not deliver a judgment of this importance by a bare majority, or perhaps, by no real majority. The Acts enable the executive to select which Judge shall try, or shall not try, particular criminals or disputes. For the Acts do not contemplate, apparently, the permanent residence of any one judge in any one place, but the removal of them at the arbitrary dictation of the local executive, whenever and wherever they may deem necessary. Coke says that the criminal shall not be allowed to select which of several judges shall try them; it seems conversely that neither should the Crown enjoy that privilege. But the main reason, on grounds of policy, would seem to be that it aims the most direct and scarcely veiled blow at the independence of the judges. No judge can tell what new district may be created, or how soon he may be arbitrarily directed to reside at McDame's Creek or Parsley River. It is in vain to say that the selection both of the judge and of the district is now to be made by the Dominion Executive. They know the judges merely by name, the districts perhaps not even by name, and must act solely on

the information of the local executive, who would thus acquire complete power to pack the Bench as they pleased, and obtain what decisions might suit them. Independent minded men would not accept or retain their appointments on such terms, and subservient men alone might occupy the seat of judgment in those parts of the Province where suits were likely to occur. It may well be argued, and it was argued, without any answer being attempted, that a grant of power to the Executive (with apparently a Parliamentary direction to use it) to lay down wholly varying rules of practice in different parts of the Province with the express object of carrying out acts *prima facie* unconstitutional, for the avowed purpose of directing the conduct of non-existing courts, and with the result, palpable and obvious, of impeding and, in fact, preventing access to an existing court, must be for those grounds alone unconstitutional. And perhaps those grounds would be sufficient if, after argument, we should determine that they were well taken. As these arguments were raised I notice them. I give no opinion upon them, because I think the sole point before me may be quite satisfactorily decided in the answer to these questions: Ist Are the sections 28 and 32 of the Act of 1881 (so far as they go to restrain the sitting of a Full Court and to authorize the Lieutenant-Governor in Council to appoint the time of the sitting of a Full Court) authorized by the British North America Act? And secondly, do the "Amendments" (I assume them to be issued in the proper form of an Order-in-Council) contain rules and regulations binding on the court or the suitors? And I am of opinion that the impeached sections and amendments are invalid on both those grounds; that there are no words in the Act which confer on the Local Legislature the power it has assumed; and that there are several clauses in the Act which designate other authorities as being invested with that power. The consequence is, I think, those sections are unconstitutional and void, so far as they enact or provide for the enactment of rules of procedure in the Supreme Court, and the so-called "Amendments" must fall with them. We shall immediately consider what steps should be taken for the relief of the suitors in this difficulty.

Before delivering judgment *Mr. JUSTICE CREASE* remarked that as the Judges had prepared their judgments separately, and he had now for the first time heard or seen that of the Chief Justice, it would not be surprising that his own observations should run partly over the same ground. He then proceeded to render the following judgment:—

CREASE, J.—

In forming a judgment upon a case argued at such length and with so many authorities upon matters which are of such grave importance—not only to one Province, but to the whole Dominion—it is necessary as much as possible to narrow and define the issues that have to be authoritatively determined by our decision. For that purpose it is advisable to clear off as far as may usefully be done all points and subjects of a preliminary nature, that we may address ourselves to the task immediately before us, forming a judgment, whether we can hear the appellants? and how? We have to render a decision in the case. That will be found an enquiry of engrossing interest. In considering these points we are not at liberty to follow the plan which the learned Attorney-General, having no connection with the Thrasher case, and intervening only as *amicus curiæ* at the suggestion of the Court, and himself unfettered, was enabled to adopt; but we have to recollect that our office in the first instance is to determine if possible the case before us. To give the relief sought, or failing that, to point to the best means available for procuring a proper hearing for the appellants before a suitable tribunal; with an ultimate view to a final appeal to the Supreme Court of Canada, perhaps even to the Privy Council at home.

The point which first presents itself for determination is:—

Are we a full Court under *Rule 404 A* of the "*Amendments to the Supreme Court Rules, 1880,*" which prescribes that "Sittings of the full "Court shall be held in Victoria for the year 1881 on Monday, the 19th "day of December,"—and able thereunder to dispose of the Thrasher case so as to enable the parties dissatisfied to appeal to a higher Court?

If we are not a full Court under that assumed authority, are we, or can we become able, as a full Court of the Supreme Court in any other way, to give the relief sought? If so, it will be our duty to give it.

The considerations and reasoning which will be absolutely necessary to enable us to reach such an end, will also of necessity oblige us to deal with the fundamental principles that underlie the whole case.

These will compel us to consider also the points raised by Mr. Theodore Davie, for our course must of necessity be dictated by the case before us, and proceed in an inverse order to the argument of the Attorney-General, and in doing so to consider as including all Mr. Theodore Davie's points several vital questions in connection with—

(1.) The authority of the Lieutenant-Governor-in-Council to make the "amendments" in question.

(2.) That of the local Legislature to delegate the power.

(3.) That of the local Legislature to make such rules of procedure themselves and legislate thereon direct.

And as an integral part of the same system of Supreme Court legis-

lation referred to us by the plaintiff in this case and rated in Regina *vs.* Vieux Violand:—

(4.) The powers claimed by the local Legislature to break up the residential unity of the Judges by distributing them about to reside in distant parts of the province.

The first matter which has to be discussed is that last advanced by the Attorney-General, viz: the allegation that by three judgments, one by each of the three Judges now here, viz: Saunders v. Reid Bros. by the Chief Justice,—Harvey vs. the Corporation of New Westminster by myself—and Pamphlet vs. Irving by Mr. Justice Gray—the immediate question before us was already settled; for that each Judge had authoritatively acknowledged that the Lieutenant-Governor-in Council was the only proper authority to make Rules of Procedure for the Supreme Court. Two out of the three were shown to be inaccurate versions of what was decided and the reasons; and I regret that I have had no opportunity of comparing my own judgment with what purported to be a printed copy, as the original has not, that I can learn, been returned. Judges and Courts can not be bound by copies of decisions suddenly sprung on them in a very serious case, and which they have had no previous opportunity of revising. It is an invariable practice for judges to revise their judgments previous to their being produced as authorized reports. But if, arguendo, the alleged copies were all correct, none of them affects to decide the point; as that question was never raised in either of the cases; but the contention was in the opposite direction; so of course the point could not be judicially decided.

The headings on each alleged copy, which affected to record a decision affirming the power of the Lieutenant-Governor-in-Council to make rules and regulate what kind of cases shall be appealed to the Supreme Court and what not, were entirely unauthorized.

All that the production of these judgments goes to show is, that each of the three Judges named was endeavoring to find a way out of a deadlock in the administration of Justice which the rule-making body had produced, and at last succeeded in doing so. The points now raised have, therefore, still to be decided.

Reluctant as all Judges are, by education and habit, and the conservative nature of their daily avocation, to enter into delicate constitutional questions, or to shake the stability of either legislative or judicial institutions (the breath of whose life, the sole secret of whose power for good, is the implicit confidence and trust they inspire), they are especially so when there may be a possibility of being themselves considered to be personally interested in the result of their investigation. When, however, unless they do so Justice is barred, duty steps in and compels them to undertake the task. The cases in the books shew that there is no escape then from a decision, even if it be only to open the door for an appeal.

The points raised by Counsel in the Thrasher case have been sent back to the Judges here from the Supreme Court of Canada at Ottawa expressly for the purpose of obtaining our opinions on the question. Without our giving a decision the appellants would be debarred from obtaining justice. By our rendering a judgment in the premises either party aggrieved there may appeal the same to the Supreme Court at Ottawa; if still discontented there, take the question to the Privy Council in England.

There was also another matter, though of very secondary interest or importance, and not in any way necessary in the determination of any of the points raised; but alluded to by the learned Attorney-General in his argument, which deserves a passing notice. He quoted an incidental allusion in the judgment of the Supreme Court in the McLean case to an early proclamation clothing the British Columbia Court with Queen's Bench powers. He stated as the result of his enquiries that nothing could be found but the rough draft of it and one fair copy; no second or amended copy signed. No correspondence with the Colonial Office as usual on such occasions, or any notice of publication in any Gazette that he could discover, and the presumption, therefore, was, he contended, against its existence, for a secret law even if signed would not be valid.

That is not the conclusion at which I have arrived; my conviction is very different. For in 1858-1859, being then the first and only practising barrister in Vancouver Island and British Columbia, and then entirely independent of the Government, I was engaged against the Crown to defend the prisoner in Regina *vs.* Neil, the first murder case in British Columbia set for trial at Langley. I was then authoritatively informed in answer to enquiry as to the Constitution and Criminal jurisdiction of Mr. Justice Begbie's Court that it had (for how long was not stated) all the powers and jurisdiction of the Court of Queen's Bench. This, also, came out in Court before the learned Judge, who drew it for Governor Douglas and Mr. Solicitor-General Pearkes, who prosecuted for the Crown at the trial: and the value of the special verdict rendered by the jury after a hot contest (in which an American ex-Judge took a very leading part) was tested before it on the following day as a Court of Queen's Bench and judgment rendered thereon accordingly. Had there been any doubt at the time it would have been my duty as prisoner's counsel with a verdict equivalent to wilful murder against him to have demurred to the jurisdiction or used any legitimate means to procure some remission of the sentence necessarily anticipated. The non-discovery of the proclamation and the absence of notice of proclamation—often of the slightest kind—and when there were no newspapers in British Columbia, and the absence of the correspondence is not surprising considering the disorganized state of the early records. The lapse of so many (over twenty) years acquiescence, and the fact that it was entirely superseded only a few months later by another proclamation giving the Court the amplest powers,—these considerations quite account for its non-appearance now. There are several acts of Vancouver Island and proclamations of the Mainland similarly circumstanced, yet always dealt with as acts and on the ordinary legal presumptions in such cases, deemed rite acta too. Its only interest now is as a historical incident connected with the first trial for murder in British Columbia.

The historical account which the Attorney-General gave of what he considered to have been the early constitutional history of the Island and the Main, until they formed the present united Colony of British Columbia, was not without its interest to me, although unable myself to regard it in the same light or draw from it the same conclusions as himself. As I regarded it, it was impossible not to feel that there was force in a remark which that learned gentleman made; that in the convictions he entertained on that subject he was either very right or very wrong. With all respect I am not prepared to dispute that position. Another preliminary point, although somewhat out of its proper order here, must

be noticed. The same learned Counsel, to whom we are indebted for presenting to us one of the sides of the argument, was anxious to impress on our minds that this Supreme Court, which is the acknowledged heir of all the powers and privileges of all the previous Supreme Courts of British Columbia, is not one of Imperial descent, but was constituted solely by and in the Colony. Now setting aside the Royal Commission of the Chief Justice under Her Majesty's own hand and signet, and my own appointment by Warrant under the same Royal hand and seal, the present Court, and each of the Judges thereof, is direct heir of the Supreme Court of Vancouver Island and its Judges. The learned Attorney-General entirely omitted to mention that this was a Court created and appointed direct under an Act of the Imperial Parliament, the 12th and 13th Victoria (1849), an Act to provide for the adminisfration of Justice in Vancouver Island, and that this occurred before it became a Colony properly so-called, and years before it had a local Legislature capable of taking advantage of section 2 or of dealing with the constitution of its Courts, and in fact it did not do so. Indeed, it is a question if it ever was in its origin a legally constituted Legislature, although it had acted as such for years. Under that Act, 12 and 13 Victoria, and the Order of the Queen in Council of the 4th April, 1856, The Supreme Court of Civil Justice of Vancouver Island was created direct from England. Mr. David Cameron by the Queen's Commission was created Chief Justice, and after him Sir Joseph Needham, until the union of the two Colonies into one, when all the Courts and their several jurisdictions, authorities and privileges were combined and handed down to the present Supreme Court of British Columbia. Sir Matthew Baillie Begbie became the sole Chief Justice; myself the Puisne Judge. Now, this Order-in-Council under the Act gave the said Supreme Court "full "authority from time to time by any Rules or Orders of Court to be by "them (sic) from time to time for that purpose made shall seem meet to "frame, constitute and establish such Rules, Orders and Regulations as "shall seem meet touching and concerning the time and place of holding "the said Court, and touching the forms and manner of proceedings to "be observed in the said Court and the practice and pleadings, upon all "actions, suits and other matters, indictments and information to be "brought therein." Bail, witnesses, evidence, admission of barristers and attorneys, sheriffs, lunatics, Probate, all costs and fees of Court and its officers, and in fact "all other matters and things necessary for the "proper conduct and dispatch of business in the said Court." "And all "such rules and forms of practice, process and proceedings were to be "framed in reference to the corresponding Rules and Forms in use in "Her Majesty's Supreme Courts of Law and Equity at Westminster" subject to the Governor's approval. The same order under the special powers gave also by a separate clause generally "to the said Supreme "Court full power, authority and jurisdiction to apply, judge and deter "mine upon, and according to the laws then or thereafter in force within "Her Majesty's said Colony." Chief Justice Cameron's Commission and Jurisdiction were very full; and covered all matters whatsoever, Civil and Criminal. A reference to the Act and Order-in-Council will shew that the powers of the Court and the Judge thereof were as ample as could be made. And these were sent out ready made direct from the Imperial Government, so that that Court was not constituted by the Colony and a fortiori by a subordinate province of a Colony. And in

the consideration of that Act the construction of law is in favor of the present Court.

For if there be anything more advantageous to it from the Vancouver Island Court, to whom it is heir, being of more direct Imperial constitution under this Act than under any others, then this Court and its Judges are entitled to the benefit of that advantage under the judgment of Jessel M. R. in the case of "*The Ettrick 6, L. R., Probate 134,* where on a question, as to which of two Acts affecting the same subject matter should apply,—the Thames Conservancy Act or a General Act, the learned Judge says: "The answer is that the powers given by "Thames Conservancy Act are so much more advantageous to them that "of course they were acting under those powers, and not under the gen-"eral Act."

In all the period from 1857 up to Confederation no change whatever could be made in the Courts or the Judges, except with the express consent of the Queen through the Colonial Office first had been obtained; and no attempt was ever made by the Colonial Legislature to deprive the Judges of the power of making Rules and Orders for the regulation of the procedure of the Supreme Courts. Such a thing would never have occurred to them. It was left to a Legislature of far inferior powers to attempt it.

The English Law Proclamation of 1858 introduced such of the Statute law of England as was not inapplicable, and all the Common Law (if any) as had not been brought in as their natural heritage by the colonists themselves when they settled in the country; and the Supreme Court of Civil Justice of British Columbia recognized and acted on the procedure in Common Law, and in Chancery, extant in 1858, and contained in the Common Law Procedure Acts, which were then new but whose practice had been tested and settled at home. In this and some similar respects the Supreme Courts here were, little as it is imagined in the East, far ahead of some of the chief Courts of older Canada. It is true these Procedure Acts were improved and amended by the Common Law Procedure Ordinance of the 9th March, 1869. And the local Legislature always with the sanction of the Crown and subject to a very active power of revision and disallowance made various changes in the Courts. But the right of the Judges to make Rules and Orders of practice and procedure was carefully preserved throughout.

The Governor of the Colony had always an immediate and unrestricted power of disallowance and reservation in constant use, and this continued unabated up to 1871, when British Columbia joined the Confederation of the Provinces, which constituted the Dominion. What transpired up to the Union in the interval between the first establishment of the Supreme Courts and the time when British Columbia joined the Union is, however, scarcely of any great value to the determination of the question which is set before us by the Thrasher counsel for solution. Neither is it of any importance to a decision what the high contracting parties before the Union while the negotiations were going on would have liked or proposed to do. To us in British Columbia—*penitus toto orbe divisos*—it is given to look with an eye that pays no regard to the inter-provincial divisions, rivalries or distemperatures existing previous to Confederation, and which that great measure was intended to cure. No judgment here will be biased either way by such considerations. We do not ask or care what negotiations took place before Confederation, but what was

the effect, where the terms of the contract itself are clear, of the contract of Union itself on British Columbia; and especially its Courts, Judges and Procedure: and that can only be gained by a careful study of the British North America Act itself. It seems strange at this day to be entering into an explanation of such a principle, that negotiations are but the necessary preliminaries to a contract; or that there is no proposition in law more accepted than that the preliminaries to a contract are at once merged in the written contract itself; but the marked reference of the Attorney-General during the argument to speeches of the great promoters of Confederation makes it necessary. The Act itself, and the Terms of Confederation which it embodies, form the contract, the effect of which we have to study.

In this research we should naturally expect to find that the object of this great constitutional Statute would only become gradually developed, as the circumstances which called for its interpretation should arise, and various legal minds should be brought to bear upon its provisions, from different points of view in different parts of the Dominion. Truth in law as well as other matters is many-sided. And this accordingly we learn to have been the case, from careful inspection of the opinions of various learned Judges throughout the Dominion on the causes that have from time to time arisen under the Act. The more recent cases of such judgments in Valin *vs.* Langlois, Regina *vs.* Burah, Severn *vs* the Queen, and others, whether in Canada itself or in appeals to the Privy Council in England, seem tending generally, though gradually, to the development of the powers and authority of the Dominion as the necessary outcome of the Federal principle at the base of the Act, and that distribution of power which whilst religiously observing treaty rights, may one day, though in the perhaps distant future, expand into national life. It is to the British North America Act, 1867, then, and the Terms of Union of British Columbia that we must go to find the solution of our present difficulty.

Here we are met by the consideration, how are we to construe it? on what principle are we to examine and interpret its details? The point to be settled is a legal one. We have to regard it from a strictly legal point of view.

It is this consideration, it is the effort to arrive at this, which has caused the Judges of this Court so much and long anxious thought and deliberation. The whole question has been before them for some time, and individual opinions have changed and varied, backward and forward, in the arguments in camera, in almost every direction, as the different authorities which have from time to time presented themselves have prevailed. Until this case arose their anxious aim had been to carry out the wishes of the Legislature as embodied in the Judicature Act, 1879. There were two clauses, however, of this Act to which they had at once felt obliged to officially call the notice of the local Executive and Legislature as fraught with danger; as being, in fact, an interference with the procedure of the Courts in matters criminal and civil—viz: Section 14—which produced the miscarriage of Justice in the first trial of the Regina *vs.* McLean and Hare murder case, and Section 17, whence arose the present difficulty. This Section 17 enabled the Lieutenant Governor-in-Council to make Rules and Orders and govern all procedure of the Supreme Court in Court and in Chambers, all forms, witnesses, evidence, duties and rights of Counsel Officers, descending even to costume; following the Judges almost into private life, abolishing the long vacation,

providing for rehearing before a full Court of all orders, decrees or judgments of a single Judge, and generally doing anything which, by that or any other Act, might be prescribed to be regulated or done by Rules of Court. These Rules and Orders were to be made entirely exclusively of the only men who for years had studied and had constant experience of the subject—the Judges. Against this extraordinary proceeding the Judges felt it their duty to protest; and even offered their services to prepare the Rules.

Their protest was contained in a combined dispatch of all the then Judges of the Supreme Court—the Chief Justice, Sir M. B. Begbie, Mr. Justice Crease and Mr. Justice Gray—to the Minister of Justice, and (it being ultimately possibly an Imperial matter), to the Secretary of State. They most respectfully protested against these sections of the Judicature Act, 1879, the Better Administration of Justice Act, 1878, and the Judicial Districts Act, as part of one, and that a vicious and erroneous system. These Acts are inseparable from each other.

They protested against legislation which threatened the disintegration of the Court and the creation of the very complicications and difficulties which have at length arisen, with, of course, a proportionate injury to the prestige of the Courts, and the administration of Justice in the Province.

They had recommended, owing to the suddenness of this legislation, the adoption of the English Judicature Rules, so far as not inapplicable to the Province, as an interim measure, preserving the immemorial Common Law right of the Judges to regulate the procedure of their own Courts by Rules and Orders compiled at a moment of more leisure. The Lieutenant-Governor-in-Council (in other words, the Local Executive) refused the Judges any voice in the matter, and passed and published the Supreme Court Rules, 1880. As these were almost a literal transcript of the English Judicature Rules, except in some few important particulars, the Judges, true to their desire to aid as much as possible the administration of Justice, raised no immediate questions on the point. If then *ultra vires* of the Executive, and the local Legislature, the alternative was that prima facie the power resided in themselves as inherent in them as a Superior Court. (Readen *vs.* Mornington, 30 L. J., chan. 663). And they loyally proceeded to the best of their ability to give them practical effect. When, however, the legislation of unification of the Judicature Act gave place to that of disintegration in the Administration of Justice Act, 1881, the whole system and administration of Civil Justice became involved in confusion, obscurity and doubt. When Supreme Court Judges were scattered in remote and sparsely inhabited districts of the country (by the Judicial Districts Act, 1879) where there was no Supreme Court work to do. Then (by section 9, administration Justice Act 1878) set to do what in Ontario would be Division Court work and with unprofessional practitioners;—required by statute (section 10, Mineral Act 1881) to hold Gold commissioner's Court —which legally would mean daily—to collect Gold Commissioner's fee for the local Treasury, settle mining boundaries and then sit in judgment on their own ministerial work;—preside in Mining Courts and discharge Magisterial duties at second hand in appeals on the merits from unprofessional Justices of Peace—leaving the highest class of judicial work for the lower, and any Dominion work entirely in abeyance—a practical *reductio ad absurdum* had been reached which placed them in a state of

cruel perplexity. During all this trying period, extending now over some five years, their most urgent representations to both Governments failed to elicit one single legal reason in answer to their respectful protests.

But still they went on doing their duty to the best of their ability making the best of the means at their disposal; even using an old voluntary clause in a B. C. ordinance of 1869 to avoid a deadlock in County Court business throughout the Country.

In any other of the Provinces of Canada except British Columbia, legislation which produced such results would not have been possible; or if attempted, would at once have disappeared before the universal opposition and disapprobation it would have elicited;—but the distance of British Columbia from Canada, the difficulty and delay of communication between places thousands of miles apart the disinclination of Judges to make complaints and the still greater disinclination of the recipients to listen to them, the utter disconnection of the Judges from the smallest political influence to attract a hearing at headquarters —misrepresentations whether unintentional or otherwise, not only of their motives but their most ordinary acts, made their situation and position a very helpless, it might almost have been said a hopeless one.

At length the present case arose. The plaintiffs American merchants of influence were turned over in a case heard before a single Judge of this Court in which nevertheless they conceived the right remained with them.

They were sent direct from this Court under section 9, (although even that I see is not free from doubt) of the Supreme and Exchequer Courts Amendment Act, to the Supreme Court at Ottawa. These, after argument, refusing even to receive the application, sent it back to British Columbia to obtain the decision of Judges in the highest Court, here, before they could be heard in appeal and with a view to a possible ultimate resort to the Privy Council of England. There is no help for it but that the Judges here should address themselves decisively to the solution of the issue placed before them. In this Thrasher case therefore called upon in due form of law, it is their imperative duty to render a decision.

Then for the first time commenced the serious enquiry among the Judges, what were the relative authorities and powers of the local legislature, the Lieutenant-Governor in Council, and the Supreme Court and its Judges, in respect of the matters before them. Their first duty, the first duty of every Judge, on a legal question being presented for decision, was to satisfy themselves they had jurisdiction to proceed to hear and decide the matters at issue. That depends in this case on the validity of Rule 401 A. That again on the power of the Lieutenant-Governor in Council to make the Rules. That, on the power of the local legislature to delegate it to them; that, in its turn, on the power of the local legislature to pass laws regulating the Supreme Courts procedure. That in its turn also on the construction to be given to the distribution of powers under the British North America Act among the Provinces and the Dominion. It is therefore to that Act and the Terms of Union, no matter from what point of view we commence our investigations, that we are continually brought back to find thereout valid reasons for our decision.

But how then are we to construe it, on what principle are we to proceed to examine and interpret its details from an exclusively legal point

of view? The learned Attorney General argues quoting the address of Counsel (Mr. Mowat Q. C.) when an advocate in the case of Severn *vs.* the Queen—Volume II., Canada Supreme Court Rep.:—"that if there "was one point which all parties at Confederation agreed upon" (and British Columbia he said, subject to the terms of Union, is in the same position as if it had been one of the original Provinces included in the Act.) "It was that all local powers should be left to the Provinces and "that all powers previously possessed by the local legislatures should be "continued unless expressly repealed by the British North America Act" adding himself in effect as his own opinion, that the Colony, having before Confederation under Governors legislated freely on the administration of Justice, Procedure, Judges, Courts and civil rights, must be assumed to have retained under the Act the same powers as to the administration of justice as before Confederation. He also contended that in each Province the legislature was omnipotent still over Court Judges and Procedure of all kinds.

It really is not necessary to comment on this argument as the Judgment itself in that very case authoritatively disposes of his position as untenable.

It is very noteworthy, and I confess to my unqualified surprise, that throughout the whole argument Mr. Attorney-General Walkem laid no stress whatever, hardly mentioned section 91, which I look upon, and have from the first examination into the Act regarded as the legal keystone of Confederation without which the whole fabric, built up with such exceeding care, would infallibly, in my humble opinion, crumble to pieces from absolute lack of a power of cohesion. The learned Attorney-General took great exception to a casual *dictum* in my judgment in the murder case *Regina vs. The three McLeans and Hare (page 73)* where speaking of the distribution of legislative powers under the Act, and the prerogative power of issuing Commissions of Oyer and Terminer, the following words occur: "I use the word reserved because the very "groundwork and pith of the Constitution Act is that the Dominion is "*Dominus*. Everything the Colony could give up, consistently with its "Imperial allegiance, was vested absolutely in Canada and re-distributed "or reserved to Dominion or Province respectively by the provisions of "the British North America Act, and this is a principle of construction, "the development of which may lead to great issues hereafter, but need "not now be further considered." He objected to the use of the words "*Dominus*" and "redistributed" as inconsistent with the legislative "omnipotence" he claimed for the province, even while it clashed with Dominion legislation, which he considered it could in Provincial matters override. But though those words were written long ago, before the decisions to which we now have access had reached us, I see no reason for altering that opinion. The only words I would vary would be, perhaps, to substitute the word "merged" for "vested absolutely" in Canada. The phrase "re-distributed," however, exactly represents the legal operation which actually took place. The Province had parted with all her rights in order to take some of them again in a different and (except where otherwise specifically prescribed) in a subordinate shape. The right of the Governor-General-in-Council to veto any local Act even when *infra vires* of the local Legislature sufficiently proves that. Of course the word "*Dominus*" will not be understood to mean that a Province has no exclusive rights of its own except with the consent of the Domin-

ion first had and obtained; for there are specified in section 92 exclusive powers given to the local Legislature which include local matters within the Province of great importance; some concurrently with the Dominion; but it has to exercise those rights so that they shall not interfere with the general legislation in similar or on the same matters under the exclusive powers expressed or necessarily implied as belonging to the Dominion under section 91.—The Dominion under the Act. Therefore, in that sense, I said long ago, and after examination of all the subsequent authorities, in the same sense, I say again, Dominion is *Dominus*.

Courts enter into these Constitutional questions with great reluctance, and although owing, as I have said to recent local legislation, the Judges here are getting a very severe training in constitutional law incessantly forced upon them, still the study is in its infancy and many and various renderings must from time to time be rendered on all main constitutional questions and even by text writers of such supreme authority as Mr. Alpheus Todd, who has been so much quoted in this case, until by a long course of decisions, the practice shall have settled into a clear and definite system. I can readily imagine the difficulty to which even the wisest lawyers would experience at home when questions like the present are for the first time brought before them for final determination; yet on this very point of supremacy of the Dominion where Federal and Provincial laws conflict, and even sometimes where they may concur, in my humble opinion depends the stability and ultimate success of this great Confederation.

It is this very section 91., which appears to me to contain the legal germ of development of the Union in the future clearly shadowed forth in the early speeches of Sir John Macdonald referred to and partially quoted out of Doutre's work, page 26 and elsewhere, by the Attorney General. This section I propose therefore to consider, and see if it bears the construction sought to be put upon it.

In Denton *vs.* Daley, tried at Digby, Nova Scotia, Savary, County Court Judge, in a clear Judgment which Doutre has made his own, says:—

"On the dissolution of the former provincial Constitutions a new "Charter was given to the United Provinces, in which one representa- "tive of the Crown alone, under Her Majesty rules. New and subordi- "nate Governments being accorded to the different provinces," compos- "ing the Confederation." In another portion of the Judgment the same learned Judge says.

Let us now consider the effects of the British North America Act, 1867, and in view of its provisions and policy there are two propositions which I may lay down with equal certainty.

The first is, that the Parliament and Government of the Dominion "constitute the supreme legislative and executive authority, subject only to "the Imperial Parliament and Sovereign of the Empire. That the former "Provincial Legislatures and Governments were merged in those of the "Dominion, while the newly established local ones are, as it were, carved "out of the latter, and are strictly limited in their powers to such as are "conferred on them by the British North America Act.

"The second is, that unlike the theory of the American constitution "by which the Parliament of the various sovereign states, or rather the "sovereign people of each state, through their representatives conferred "certain limited and defined powers upon the Federal Government and "Congress, so that every power not expressly thus conferred is supposed

"still to rende in the different states, that unlike this theory, every au-
"thority not expressly or by necessary implication conferred upon the
"local Government and legislatures by the British America Act, resides
"in those of the Dominion."

In another part of the same judgment, we find the observation:—

"But we *do* find as a striking indication of where it was intended
"that the sovereign legislative and executive power of Canada should
"reside, that the Criminal law is a subject of exclusive legislation by the
Dominion Parliament.

The words of the 91 section are very sweeping :—

"It shall be lawful for the Queen by and with the advice and con-
"sent of the Senate and House of Commons to make laws for the peace,
"order and good Government of Canada in relation to all matters not
"coming within the class of subjects by this act assigned exclusively to
"the legislatures of the Provinces; and for greater certainty but *not so as*
"*to restrict the generality of the foregoing terms of this section*, it is hereby
"declared that (*notwithstanding anything in this act*) the exclusive legisla-
"tive authority of the Parliament of Canada extends to all matters com-
"ing within the classes of subjects next herein after enumerated (enumer-
"ating them, nos 1, to 26.) 27, the Criminal law except the constitution of
"courts of Criminal jurisdiction but including the procedure in criminal
"matters."

28. ....

"29. Such classes of subjects as are expressly excepted in the enu-
"meration of the classes of subjects by this Act assigned exclusively to
"Legislatures of the Provinces."

And the Act adds a rider which emphasizes the superior authority of the Dominion Legislature by the last paragraph.

" And any matter comng within any of the classes of subjects enu-
"merated in this section shall not be deemed to come within the class of
"matters of a local or private nature comprised in the enumeration of
"the classes of subjects assigned exclusively to the Legislatures of the
"Province."

Lord Carnarvon in introducing the Bill into the House of Lords does not ignore the 91st section, but says: "In this is, I think, com-
"prised the main theory and constitution of Federal Government; on
"this depends the practical working of the new system. * * * The
"real object we have in view is to give to the Central Government those
"high functions end almost sovereign power, by which general principles
"and uniformity of legislation may be secured in those questions of
"common import to all the Provinces; and at the same time to retain for
"each Province so ample a measure of municipal liberty and self-govern-
"ment as will allow, and indeed compel them to exercise those local
"powers which they can exercise with great advantage to the commu-
"nity."

Surely, the administration of Justice is a matter in which the Dominion may be expected to have a very strong interest. After commenting on the distribution of powers, Lord Carnarvon adds:

" In closing my observations on the distribution of power, I ought
"to point out that just as the authority of the Central Parliament will
"prevail wherever it may come into conflict with the local Legislatures.
"So the residue of legislation, if any, unprovided for in the specific
"classification which I have explained will belong to the Central body."

It will be seen under the 91st clause that the classification is not to restrict the generality of the powers previously given to the Central Parliament, and that these powers extend to all laws made "for the peace, "order and good government of the confederation, terms which according "to all precedents will, I understand, carry with them an ample measure "of legislative authority." He adds to that effect, that while Dominion Acts are confirmed, disallowed or reserved for Her Majesty's pleasure by the Governor-General, Acts of the local Legislature are transmitted only to the Governor-General, and are subject to disallowance within the space of twelve months by him.

Gwynne J. (re Niagara election case, 29 U. C., C. P. 275) distinguishes between the distribution of powers in the Constitution of the United States and Dominion Government as follows:

The powers of the general government are made up of concessions of the several States. Whatever is not expressly given to the former the latter expressly reserve. With us the very opposite of this is the case.

The Dominion Government and the several Provincial Governments emanate from the one sovereign power—the Imperial Parliament. The Provincial Legislatures have no jurisdiction whatever but what is expressly conferred upon them by the Statute which calls them into existence. (This is very different from the Attorney-General's contention.) Whereas by the same statute upon the Dominion Parliament is conferred the power of making laws not merely in respect of the particular subjects enumerated, but in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Province.

In the case above-quoted, Denton *vs.* Daley, legislation which it was quite competent for the local Legislature to make, e. g., regulations as to the retail sale of spirituous drinks, must give way when the Dominion Parliament intervenes in its paramount authority on any subject specially conferred upon it by the British North America Act.

In Leprohon *vs.* City of Ottawa, 2 Ont. App. 522, it was held by an unanimous Court, Spragge, C., Hagarty, Chief Justice, C. P., Burton and Patterson, J. J. A., that a Provincial Legislature has no power under sub-sections 2, 13 and 16 of section 91 of the British North America Act to impose a tax upon the official income of an officer of the Dominion Government. That case further determines that all Government officers as public servants of the Dominion are an essential part of the means and instruments by which the Government of Canada is carried on, and as such are not objects of taxation by the local Government. The dicta and reasons which led to that conclusion are very instructive in considering the position of the Supreme Court Judges in British Columbia., and the effort to compel them to do many kinds of Provincial duties beyond those of a Supreme Court Judge, and apply even with greater force to occupying their time to the exclusion or limitation of their power to serve the Dominion.

Spragge, C., in that case laid down the dictum that the powers of the Dominion Legislature and of the Provincial Legislature are distributed in classes assigned to each. The Provincial Legislature having only the powers specifically conferred; the Dominion Legislature having, besides those specifically conferred, all powers not specifically conferred upon the local Legislature.

L'Union St. Jacques de Montreal vs. Belisle, 1874, (L. R., 6 P.C., 3) was quoted to show that a Provincial Legislature could interfere and

legislate on subjects exclusively given by section 91 to the Dominion, namely, Insolvency; but there the decision turned on the point that the local Act complained of as dealing with insolvency was merely dealing with a local and private association in such a manner as to prevent it from becoming insolvent; and, therefore, as Lord Selborne decided, "to "keep the Act out of the category of the 91st section, and not to bring it "into it."

This, therefore, if an authority at all, would be against the Attorney-General, and even the powers of the Dominion Legislature, though so potent under section 91, do not exceed those of the former Colony, and were limited e. g., as regards the Imperial Parliament; for in Smiles *v.* Bedford (1 Ont. App., 436, 1877) it was held by an unanimous Court that under the British North America Act, (section 91, sub-section 23) no greater pawers were conferred on the Parliament of the Dominion to deal with the subject than had been previously enjoyed by the local Legislatures.

In Fredericktcn City *vs.* the Queen and Baker (3 Can. S. C., 505), it was decided that the Canada Temperance Act, 1878, could not be enacted by the local Legislature, there being no express power given to that effect—that power necessarily falls under the control of the Dominion Parliament (by virtue of the sweeping force of section 91). Also, that inasmuch as the right to prohibit any trade has been excluded from, by not being assigned to, the Provincial Legislature, it must necessarily be taken under section 91 to have been delegated to the Federal Government.

The powerful judgment of Mr. Justice Ritchie in this case will repay perusal, as also in the case of Regina vs. Justices of Kings County, 2 Pugs., 535, where it was held the local Government had not the power (in the presence of section 91) to prohibit. I have been thus particular in referring to the powers granted and implied in favor of the Dominion Parliament under section 91, because the learned Attorney-General almost ignored it altogether and based the strength of his posi ion on behalf of the local Legislature on the "omnipotent" powers of section 92, and argued throughout that the Provinces went with powers unchanged into Confederation, save as to such specified subjects as they gave up to the Dominion, and that whatever of such previous Provincial powers was not so specified in section 91, in favor of the Dominion, was retained by the Province. And from that he argued, on the case more immediately before us, that the local Legislature having for a series of years nearly absolute power (subject to the Governor and Imperial authority) over Courts, Judges, Residence, Rules and Orders of Procedure, and everything relating to the administration of Justice within the Province had exactly the same powers, still after Confederation, except mere criminal Procedure—even to antagonism with the Dominion Parliament itself.

In order to construct such a theory it became necessary to ignore section 91, and the Imperial Vancouver Island Act of 1859, and that the learned Attorney effectually did. But then what is the value of a legal argument on the British North America Act, which entirely ignores section 91?

We have seen the sweeping character of section 91, let us now see what section 92 contains as bearing on the present case.

It says :—"In each Province the Legislature may exclusively make "laws in relation to matters coming within the classes of subjects next "herein after enumerated."

[Then follows the enumeration sub-sections 1, to 13, which need not be mentioned here. Suffice it to say that they refer entirely to matters within the province.]

"Sub-section" 14, Property and civil rights in the province," Now at first sight this would seem a very sweeping power to give exclusively to the local legislature, yet read by the light of the whole act, and the various decisions upon it, bears a very different aspect from that sought to be given to it by the Attorney-General.

Tried by the rule which has been adopted in all similar cases, its exclusiveness and comprehensiveness both nearly disappear. It is the rule adopted in Fredericton City *vs.* the Queen as an unerring guide in determining whether any given subject is within the jurisdiction of the Provincial Legislature or of the Parliament, namely, "all subjects of whatever "nature, not exclusively assigned to the local legislatures are placed "under the supreme control of the Dominion Parliament; and no matter is "exclusively to the local legislatures unless it be within one of the sub-"jects expressly enumerated in section 92 and AT THE SAME TIME does not "involve any interference with any of the subjects enumerated in sec. 91."

The great distinction between sections 91 and 92 is, that while in the former the subjects enumerated are only designed as *examples* of exclusive legislative powers, in the latter the exclusive legislative powers appear to be all enumerated.

L'Union St. Jacques de Montreal *vs.* Belisle L. R. 6 P. C. 31,—35, and Dow *vs.* Black, L. R. 6, P. C. 272,—380.

In Cowan *vs.* Wright (23 Grant Ch. 616) via. Chancellor Blake said that the true principle is set forth *inre* Goodhue, "that to the Provin-"cial Legislatures are committed the powers to legislate upon a range of "subjects which is indeed limited but that within the limits prescribed "the right of legislative is absolute." (This sounds very like the Queen *vs* Burah.) The real question is what are those limits, and that is a chief question in this Thrasher case. That subsection 13, of section 92, gives the local legislature exclusive power to legislate on property and civil rights within the province, without reference to the exclusive powers of the Dominion Parliament, will I expect be scarcely maintained; and yet the words taken without qualification run so—Harrison J. in Parsons *vs.* the Citizen's Insurance Company 43 U. C. Q. B. 261, (affirmed by 4 Ont. App.) says :

"For the powers of the Dominion and Provincial legislatures we "must refer to the fundamental law on the subject, the British North "America Act. The only exclusive powers expressly conferred by that "act on the Provincial legislatures are those enumerated as in section 92, "of that act. One of these is the incorporation of companies with provincial objects (sub-section 11) another is "property and civil rights in the province" (sub-section 13.) The last is "all matters" of a merely local or private nature in the province, (sub-section 16r) Subject to these and the other powers enumerated in section 92, it is in the power of the Legislature of the Dominion to "make laws for the peace order and "good Government of Canada." "No words in reference to legislation "could be more comprehensive than these words. Examples however are "given of the exclusive legislative powers as to different classes of sub-"jects intended to be vested in the Dominion Parliament by section 91. "These it is expressly declared are not to restrict the generality of the "foregoing terms of the section (91)."

And no matter coming within any of the classes of subjects enumerated in section 91 is to be "deemed to come within the class of matters "of a local or a private nature comprised in the enumeration of the "classes of subjects by this Act assigned exclusiveiy to the Legislatures "of the Provinces."

The learned Judge adds: "It is not possible for each of the legis-"lative bodies as between themselves exclusively to exercise the same "powers. If the power be shown to belong to one of the bodies, this "under such a section excludes the other from the exercise of the power."

I have taken pains to collect such of the various decisions as have reference to the construction of these sections of the Act, to aid in applying the Act to the case and the points raised before us.

Treating of the rights of local Legislatures, after a clear reference to the powers of the Dominion Parliament, Chief Justice Ritchie in Valin *vs.* Langlois, page 15, says:—

"But while the Legislative rights of the local Legislatures are in "this sense subordinate to the right of the Dominion Parliament, I think "such latter right must be exercised so far as may be, consistently with "the right of the local Legislatures; and, therefore, the Dominion would "only have the right to interfere with property or civil rights so far as "such interference may be necessary for the purpose of legislating gen-"erally and effectually in relation to matters confided to the Parliament "of Canada."

We now come to sub-section 14 of section 92—

"The administration of Justice in the Provinces, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in civil matters in THOSE Courts."

This sub-section taken by itself would at first sight appear to include all those omnipotent powers the learned Attorney-General contends for.

But following the ordinary rule for the construction of Statutes, and read by the light of the Act itself and its various provisions, and comparing these with the various decisions thereon, it will be seen that the exceeding generality of the words must be applied with very considerable modifications, indeed; and in that respect accords exactly with the principles of construction I have already laid down. Valin *vs.* Langlois clearly establi hed that the Dominion Parliament has the right to interfere with civil rights when necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada. It also established that the Dominion Parliament has a perfect right to give to the Supreme Courts of the respective Provinces, and the Judges thereof, the power and duty of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established Courts to discharge those duties, in any particular, invade the rights of the local Legislature; and that its power over procedure in civil matters means procedure in civil matters within the powers of the Provincial Legislatures.

The Chief Justice here very truly said, and we are here to bear witness to it this day, that that question involving the respective Legislative rights of the Dominion Parliament and the local Legislatures, was one of the most important questions that could come before that Court, and that its logical conclusion and effect must extend far beyond the question then at issue. In page 14, that learned Judge draws attention to the

causes which have diverted somewhat from their real aim, i. e., correct conclusions, certain previous judicial decisions on the subject, which attributed too much importance to section 101, and to sub-sections 13 and 14 of section 92, which vest in the Provincial Legislatures the exclusive power as to property and civil rights in the Provinces, and the administration of Justice and procedure in civil matters.

Neither this nor the right to organize Provincial Courts by the Provincial Legislatures was intended in any way to interfere with, or give to such Provincial Legislatures any right to restrict or limit the powers in other parts of the Statute conferred on the Dominion Parliament, or to direct the mode of procedure to be adopted in cases over which it has jurisdiction, and where it was exclusively authorized and empowered to deal with the subject matter, or take from the existing Courts the duty of administering the laws of the land.

And that the powers of the local Legislatures were to be subject to the general special legislative powers of the Dominion Parliament. The Attorney-General relied very much upon The Queen *vs.* Burah, L. R., 3, App. Ca. 904, in connection with section 129 of the British North America Act as confirming the position he took up of the omnipotence of the local Legislature over the Supreme Court, and Judges, the Evidence, and Procedure. But with all deference and respect I must say a close examination of the authority itself supports the conclusion that it is a very strong one against his contention.

In quoting Lord Selborne's judgment, while comparing the power of the Indian Legislature with those of Canadian legislatures, he quoted that portion which says: "The Indian Legislature has powers expressly "limited by the act of the Imperial Parliament which created it, and it "can, of course, do nothing beyond the limits which circumscribe those "powers. But when acting within those limits it is not in any sense an "agent or delegate of the Imperial Parliament, but has and was intended "to have plenary powers of legislation as large and of the same nature "as those of parliament itself." The e Mr. Attorney stopped. Had he continued to read on—the following sentences would have naturally had their influence as bearing on the sub-section (14) before us:

"When a question arises whether the prescribed limits have been "exceeded, the established Courts of Justice must of necessity determine "that question, and the only way in which they can properly do so is by "looking to the terms of the instrument by which affirmatively the leg-"islative powers were created, and by which negatively they are re-"stricted."

Lord Selborne does not say with the Attorney-General, you must enquire into all the previous negotiations which led up to its enactment or that we must look to a previous compact and give our legal interpretation to the act by the light of that; but he lays down this broad rule for our guidance. "If," says Lord Selborne, "what has been done in legisla-"tion is within the general scope of the affirmative words which give the "power, and if it violates no express condition or restriction by which "that power is limited (in which category would be included any act of "the Imperial Parliament at variance with it) it is not for any Court of "Justice to enquire further, or to enlarge constructively those conditions "or restrictions;" and that is the real test by which to try this case.

The case of Valin *vs.* Langlois established conclusively that which has never been doubted in this Court—that the Dominion Parliament has

a perfect right to utilize established Courts in the Province, and the Judges thereof, who, as the learned Chief Justice most aptly observed, are appointed by the Dominion, paid out of the Treasury of the Dominion, and removable only by address of the House of Commons and Senate of the Parliament of the Dominion, to enforce their legislation.

That is a doctrine which has always been accepted and acted upon by this Court, e.g (in Insolvency, Customs and the like) which is established not only to carry out local laws but those of the Dominion. In the Dominion there is scarcely an Act that must not in some part be held *ultra vires* if any other doctrine were well founded. Indeed, I always understood that the Supreme Court Judges going into Confederation, were entirely Dominion Officers of a Dominion Court in the Province—to carry out the laws of the Province and the Dominion. In the great majority of Dominion Acts there are provisions not only vesting jurisdiction in the Courts in the Province, but also regulating in many instances and particulars the procedure in such matters in those Courts. e.g. Customs, Inland Revenue, Public Works, Banks and Buildings, Trade Marks, Fisheries, Public Lands, Inspection of Staples, Aliens and Naturalization, Patents, Insolvency, and a host of others. Without the use of these Courts for the above purpose, or new ones established for the purpose, Dominion affairs would soon be at a dead-lock.

In Valin *vs.* Langlois therefore, (p. 35), the Court saw no reason why they should not delegate to the Judges of the several Provinces individually, collectively, or both, whom they appoint and pay, and can by address remove, and establish Courts by *engrafting on* (or establishing independent of) those Courts throughout their respective Provinces tribunals eminently qualified to discharge the important duties assigned to them. "They have not thereby invaded the rights of local legislatures "or brought the new jurisdiction or the procedure under it in any way "in conflict with the jurisdiction or procedure of any of the Courts of "the Province." And each of those Dominion Acts has reference to the procedure necessary to enforce it, and that in each case dealing with civil rights, many of them civil rights in the Province; and yet over which the local legislature has not any control or say.

The fact is, the Constitution Act of Canada only lays down broad but distinct well guarded principles and lines of demarcation between the different legislative powers of separate legislative bodies, sometimes over the same subject, leaving these principles to be applied from time to time according to the ever varying growth and changes in the subjects of legislation incident to a new and progressive country. Now to apply the aforegoing general principles of construction to the case before us.

This provision as to the administration of justice gives the Province authority to provide for the administration of justice: that is to see that it is administered in all Courts sitting in the Province, and to declare the powers and the subjects of jurisdiction (within the limits of their own statutory authority) of such Courts as they may think proper themselves to 'constitute, organize and maintain' in the Province, and to provide for civil procedure in "those" Courts (still within the statutory limitations) in the Province. Now Courts answering to this description have been established by the Province, such as Gold Commissioners' Courts, Mining Courts and the like to which these powers over procedure can apply.

No other Courts are expressly referred to, and we have seen that section 91 reserves to the Dominion everything that is not assigned ex-

clusively to the Provincial Legislature, consequently if there be any Court in the Province not 'constituted and maintained and organized' by the Province the Province cannot interfere with its procedure.

Now it is sufficiently clear that justice can only be administered in the Province through the ordinary channels, the established Courts, e.g. in B. C. especially, the Supreme Court.

Then arises the question: Can the local legislature under this and the previous subsection provide directly for the procedure of the Supreme Court? That depends on whether the Supreme Court is a Provincial Court "constituted, organized and maintained" by the Province. The Chief Justice informs me that he has entered into that point at great length and with much particularity; so that it will not be necessary, concurring as I do generally in his views on that subject, to enter at similar length upon the question. Still it is one of such importance to the point at issue, whether we are or can sit as a Full Court or not, that I am constrained to enter somewhat into the consideration of it, even at the risk of repetition; especially as I have not seen or heard what the Chief Justice has actually written respecting it.

I have already shewn that the Supreme Court of British Columbia and its Judges are the heirs of the jurisdiction, status and authority of the Supreme Court of Civil Justice of Vancouver Island and its Judges. That was an Imperially constituted Court. Its Chief Justice was empowered under the Act and Order of The Queen in Council to make Rules and orders for the practice and procedure of the Court. This power was never disturbed by any local legislation prior to Confederation. Without any declaratory statute to that effect, (for it was unnecessary,) that Court administered all the Common Law and Statute Law of England applicable to a settled colony. The Court appointed under this statute had the Supreme revising and controlling power over all other Courts in the colony. All others were Inferior Courts.

The present Supreme Court too and its Judges are also the acknowledged heirs of the Court of British Columbia, the Supreme Court of Civil Justice of British Columbia, the Supreme Court of the Mainland of British Columbia, (under Consolidated Statutes 1871, chapters 51, 52, 53, 54, 55, 56, 57, 58,) with all the jurisdiction powers and authorities in all matters civil and criminal, up to confederation in 1871, that a Supreme Court could receive. The present Chief Justice was the original Judge of the British Columbian Court, sent out direct under the British Columbia Act by the Imperial Government with a Commission under Her Majesty's own hand and seal, under which he still acts. The Senior Puisne Judge of that Court was appointed by an authority also under Her Majesty's own sign manual and signet, before its Confederation with Canada will be exactly the same jurisdiction, power and authority as the Chief Justice. The second Puisne judge was appointed in 1872 under a Royal Commission, giving him exactly the same statutes and jurisdiction also over all British Columbia, and all pleas civil and criminal whatsoever.

At the Union of British Columbia with the Dominion, this Supreme Court had the supreme supervising power over all other Courts in the then colony in all matters whatsoever Civil and Criminal; and the British North America Act has continued it in that same position as the chief superintending and revising Court civil and criminal in the province under section 129 and other sections. It had supreme jurisdiction over every kind of plea except admiralty; indeed the Puisne Judge

too in the absence of the Chief Judge in Admiralty had that. The Judges by a long succession of Statutes, indeed nearly every one which touched on the question of Rules, and Orders from 1857 and 1858 down to and including the last which was passed in 1869, (British Columbia Consolidated Statutes 1871, chap. 53). [The Supreme Court Ordinance 1869] The Judge or Judges have been the only authorities previous to confederation to make the Rules of Procedure for the Supreme Court.

The Supreme Court Act 1869, and the previous one (Consol. Stat. C. 52.) were specially sanctioned and sent out from Downing street, and not altered by the Courts Merger Ordinance 1870. These gave or rather confirmed that inherent power in the Judges which existed in them previously at Common Law and still exist in them as their inherent rights. (2, Chit. Stat., p. 505, n. quoting Dowl. N. C. 323, 3 Scott N. R. 52, 3 M. and G. 125, Readeu *vs.* Lord Morington 30 L. J., 663.

That power has only been disturbed or sought to be taken away from them by section 17, of the British Columbia Judicature Act 1879, and placed in the hands of the Local Government. It is this assumption which is challenged by Mr. Theodore Davie as Counsel for the Thrasher as being unconstitutional and ultra vires, and therefore void.

As the validity of this contention must depend upon the British North America Act and the terms of Union, and we have already partially considered sections 91 and 92, we must continue our investigation into the effect of sections 129, 96, 99, 100 and 130, as read by the light of the whole Act and the various judicial decisions that have taken place upon the legal relations between the Supreme Court and its Judges and the Local and Dominion Legislatures, and then proceed to apply the principles and law deducible therefrom, to the points and the case before us.

In this research we have already seen that we must not expect to find that an Organic Act of this kind will attempt to specify particularly even all the general heads of the subjects on which either Dominion or Local legislature can be expected to legislate. It would require omniscience to fore see what in the course of time may arise to call for legislative interference. All the framers of it could be expected to do would be what they have done in sections 91 and 92, lay down clear principles of distinction between the classes of subjects which were to be dealt with by the several Legislatures, enunciate clear principles to guide them in their respective legislations, and compile the other sections of the act with special though inferential reference to the guiding principles so laid down, and especially guarding against clashing of authority. Now interpreted by the principles I have been endeavoring, by the aid of the more recent decisions to explain, all the parts of the act work well enough together. Tested by any other principle they will be found to be jarring and incongruous. Now keeping what I have said in mind; let us see what section 129 and these other sections say; remembering in construing them, that article 10 of the Terms of Union made British Columbia as if an original member of the Confederation, as say Nova Scotia, section 129 of the British North America says :—

"Except as otherwise provided by this Act, all laws in force." [In British Columbia] " at the Union [20 July 1871] " and all courts of ci- "vil and Criminal jurisdiction and all legal Commissions, Powers and "authorities and all officers judicial, administrative and ministerial, ex- "isting therein at the Union shall continue in" [British Columbia] as if

"the Union had not been made. Subject nevertheless (except with res-
"pect to such as are enacted by or exist under Acts of the Parliament of
"Great Britain) to be repealed, abolished or altered by the Parliament
"of Canada or by the Legislature of the respective province according to
"the authority of the Parliament or of that Legislature under this Act."

This section Mr. Attorney contends is the strongest in his favor; for according to his theory (the same which was started and overruled in Regina vs. Taylor and Severn vs. the Queen), the Province and its Legislature under Section 92, and this section entered into Confederation with all its old jurisdiction and authority over the Supreme Court and its Judges, their residence, and its procedure as it had when a Crown Colony before Confederation, except what IT gave up to the Dominion in Section 91, and that what is not enumerated in Section 91 belongs to the Province. This is exactly the reverse of the principle of construction, for these sections, so clearly pointed out by Chief Justice Harrison, Chief Justice Ritchie, Chief Justice Hagarty and other eminent Judges of this our Dominion of Canada. Their principle of construction is however, now too well settled to be shaken. Under that, the words of Section 129 are to be taken in their plain and ordinary sense, and those words do expressly continue to this Court and its Judges their full jurisdiction, commissions, privileges, powers and authorities quite as fully as they enjoyed them before Confederation; not, however, as accidentally escaped Mr. Attorney, to render Courts and Judges who are sworn to obey the Law independent of the Law, but that they should be subject to such legislation only as is provided by competent authority under the British North America Act. What that is will hereafter appear.

The local Legislature have no such clause in their favor as Section 129, handing down or returning THEIR ante-Confederation powers unbroken. There is no such section beyond the restricted though exclusive powers of Section 92.

Whence then do they derive legal authority to authorize, "it shall "be lawful for," His Excellency the Governor-General-in-Council to prescribe the residences of the Supreme Court Judges *à fortiori* the elder ones, say in Cassiar on the Arctic Slope: at Kootenay in the Rocky Mountains, or at Cariboo? or to destroy the residential unity of the Supreme Court and its Judges, so valuable in a young country for uniformity of practice and decision, and the fostering of a healthy legal atmosphere and of a learned and experienced Bar!"

Whence comes the authority to break through the Treaty obligations of the Terms guaranteeing their status and privileges, that passed with labored care through three separate independent Legislatures and received the grave sanction of both Houses of the Imperial Parliament and the solemn imprimatur of Her Majesty's Assent? If they have not the power under Section 92 they have it not at all; and if they have it not how can they bestow it on His Excellency, who since Confederation would appear to have no legislative power of himself. If he have, then the Governor-General-in-Council could nullify the British North America Act, which in such case would have been passed in vain, and all the studied care of the illustrious statesmen who framed it to secure the independence of the Judges as indispensible to the administration of Justice, has been thrown to the winds.

Put to return:—

Now this Court is, no doubt, so far a "Provincial" Court that it is in the Province, and its jurisdiction confined to the Province. Owing to the poverty of our language the same word is often made to do duty in many and various senses, e. g., government sovereign, quasi sovereign and many others. Here the words "Province" and "Provincial." But the Province now is the Province of the British America Act; and has not "constituted" this Supreme Court. That was done by the Imperial Government, confirmed by the Colony before Confederation, and Section 97 of the British North America Act and the Terms of Union placed that since the Union, in the hands of the Governor General as regards Superior District and County Courts. Neither has the Province "maintained" the Supreme Court, for although it pays the expenses of Court House, Buildings, Registrar, witnesses and the like, under the charge for "ad-"ministration of Justice." Still it has not "maintained" the Judges, although they compose the Court, in salaries, allowances or circuit expenses. Indeed, Section 130, I think, shows this. That says:—

"Until the Parliament of Canada otherwise provides, all officers of "the several Provinces having duties to discharge in relation to matters other "than those coming within the classes of subjects by this Act assigned "exclusively to the Legislatures of the Provinces, shall be officers of "Canada, and shall continue to discharge the duties of their respective "offices under the same liabilities responsibilities and penalties as if the "Union had not been made."

That indicates, as I consider, incontestibly that even such payments would not have constituted the Supreme Court Judges Provincial officers, (or, as Mr. Attorney contended, Provincial officers for occasionally Dominion purposes a sort of loan to the Dominion). That section in effect says that notwithstanding certain Officers did at Confederation occupy a position which made them Provincial as well as Dominion officers, [such as the old stipendiary magistrates, who were also County Court Judges, local Governn ent agents, etc.] they should now be only Dominion officers. The other alternative construction that it only meant to say officers discharging Dominion duties shoutd be Dominion officers bears a reductio ad absurdum on the face of it. The ratio decidendi in Leprohon *vs.* the City of Ottawa, page 543, proves not only that the Judges are Dominion officers, and their Court a Dominion Court in the Province for carrying out Dominion and Provincial laws, and that in no respect whatever has the Province any more control over them to send them here, to "district" them there (for that point was also specifically raised for solution by Mr. Drake and Mr. Theodore Davie in this and in the Vieux Violand case) than they have to send the Collector of Customs, the Collector of Inland Revenue, the Postmaster or Dominion Auditor to "usually reside and discharge their duties" at Dease Lake, Caribou or Francois Lake.

The question in Leprohon's case was merely as to the right to tax a Dominion officer. But the dicta in it are of great value in applying the *principles* on which it was decided to the cases of all other Officers of the Dominion.

At page 543 of the Report we find the following:

The exemption of Dominion officials from taxation rests in both cases (i. e., in State and Federal Governments) upon the necessary implication and is upheld by the great law of self-preservation, as any government

whose means are employed in conducting its operations if subject to the control of another and distinct government can only exist at the mercy of that government. Of what use are these means if another power may tax them at discretion. The ratio decidendi here applies to the present case. Of what use will Dominion Judges be if the local Legislatures have the right to fill up all their time with duties which they were not appointed to fulfil, to the exclusion of judicial Dominion duties? or to banish them to remote districts where they shall be useless for Dominion purposes. Our greatest Canadian Judges have in their judgments quoted largely from analogous cases occurring between the States and Federal Governments, and their officers, as being *à fortiori* cases when applied to cases between the Province and Dominion, and for this reason: that Province and Dominion derive their respective legislative authorities from the Queen, Lords and Commons in the Imperial Parliament, which is an absolute and complete sovereign power, while the States and Federal Legislatures derive theirs from compact endorsed by their sovereign, the People. In both cases the powers granted to the central power (except peace and war) are similar to those granted by the English Parliament to the Dominion; among others the power of appointing and, by necessary implication therefrom, preserving control over its own officers.

There is the additional check given to the Dominion of disallowance in cases were a Provincial Act is supposed to affect the whole Dominion or to exceed the jurisdiction conferred on local Legislatures, or even where the jurisdiction is concurrent, but clashes with the legislation of the general Parliament. This power of disallowance has been sometimes, but not invariably exerted; but, whether allowed or not, to the extent that the Provincial Acts transcend the competence of the Provincial Legislature they are void.

Then speaking of the power claimed of taxing the salaries and diminishing incomes fixed by the Dominion and within their competence, the same learned Judge uses language which, though employed with regard to taxation of income, is immediately applicable to the case of a local legislature imposing all kinds of judicial duties on Supreme Court Judges—not appertaining to the Supreme Court—and sending them off to reside in exile far from civilization and that Supreme Court work which they contracted, and were engaged to perform:—

"If the power exists at all it can be exercised to any extent, and in "the event of any Province being dissatisfied with the Dominion Gov- "ernment it would hold in its hands a weapon, to which it might resort, "to harrass the Government and enforce its demands."

Has British Columbia no demands to enforce? The same power if it existed would enable the local legislature to impose new and foreign duties on a Supreme Court Judge belonging to the Dominion. The learned Attorney-General talked very much of trusting to the great "discretion" of local legislatures that no injury should ensue from the respective powers or laws of Province and Dominion, overlapping or conflicting with each other. Now with the utmost deference and respect I would say on this point,—hear what that eminent jurist Chief Justice Marshall says on the subject. "But all inconsistencies are to be recon- "ciled by the magic word "CONFIDENCE." * * * There is no securi- "ity that in the exercise of a power, which is capable of being exercised "to the detriment and embarrassment of the the Central Government, "the Provincial Legislature will always be guided by a judicious regard

"for the harmonious working of all the departments of the Constitution. "What motive may be found sufficiently powerful to lead to antagonistic "legislation, or whether any such motive may arise; or whether from "caprice or rude theories of political economy or from any cause what- "ever the power now in dispute may be exercised in a vexatious, manner "must be a matter of speculation"

The learned Judge spoke of Ontario; is it applicable to British Columbia? Let any one familiar with the local legislation of the last five years affecting the Supreme Court and its Judges make reply. Chief Justice Marshall in McCulloch vs. Maryland, 4 Wheaton, 316, at page 428, comparing the respective rights of taxation of Federal and State Governments, and the check the people of the State are on the abuse of State taxation, adds:

"Now the means, i. e., the officers employed by the Government of "the Union, have no such security, nor is the right to tax them sustained "by the same theory. These means are not given by the people of a "particular State, not given by the constituents of the Legislature which "claim the right to tax them, but by the people of all the States."

"They are given by all for the benefit of all; and upon theory should "be subjected to that government only which belongs to all."

Apply this to the Supreme Court and its Judges and substitute Province for States, and Dominion for Government of the Union, and the analogy is more than complete, it is *à fortiori* applicable.

In cases like this, where we have no, or scarcely any, English decisions to guide us, for such federations do not exist there, the authorities of the United States, where very similar political legislative bodies exist, though not binding on us, are entitled to the greatest attention and respect, as the production of some of the greatest jurists the world has produced, and who have given this class of questions long and profound study, while still in the prime of life and yet of great Judicial experience. All these authorities and our Canadian decisions concur in describing the United States officers, (in our case it would be the Dominion officers), "the means and instruments by which the affairs of the "Dominion are administered." And this applies to the Supreme Court Judges.

It follows, therefore, that appointed by the Dominion, paid by the Dominion, removed by the Dominion by address through the Dominion Houses of Parliament, they are entirely officers of Canada; and to endeavor to force them by local legislation so to fill up their time by petty local work as to impede, delay or prevent Dominion work, (for if they can do it for a day they can do it for ever), is in effect by legislation to limit the right which, on general principles, and sections 96, 99, 100, 129, 130, 131 of the British North America Act, the Dominion has to their Judicial services. Suppose for a moment the scheme for a general uniformity (under sections 97 and 101) of laws throughout the Dominion, (except, of course, Quebec) actually carried out, as it surely one day will be, and the Supreme Court Judges employed to execute them in British Columbia, could the local Legislature for one moment legislate their time away in local matters to the hindrance of their Dominion duties; yet legally they are in the same position now. They are Dominion officers for the discharge of Dominion duties and local Judicial duties in the Province so long as they do not conflict with the Dominion, and though they put in force all Provincial and Dominion laws they are in no respect

officers of the Province. The *ratio decidendi* of Valin vs. Langlois effectually establishes that position.

In the same manner it may be shown that the Province has not "organized" the Supreme Court, so that in neither of these three senses is it a Provincial Court. And unless it were all three combined, "con-"stituted," "maintained" *and* "organized" by the Province it could not be one of "those" Courts within the purview of sub-section 14.

Again, it is a rule of construction of Statutes that if it be possible a Statute should be so read that the whole of it should speak and be sensible, so that it becomes necessary to enquire, if there are any Courts in the Province which answer to the description in sub-section 14, to whom it can apply. Now there are (as we have said) such here. There are Courts constituted, organized and maintained by the Province, viz: the Gold Commissioner's Court, the Mining Court, Courts of Revision and other Courts to which this description does apply. They, therefore, and not the Supreme Courts are the Provincial Courts within sub-section 14; and over the Procedure of all "those" Courts the Provincial Legislature has complete authority.

It is singular that this point as to the actual and literal meaning of this sub-section 14, in fact, that all this constitutional question should not before have formed the subject of a single decision in the Courts of the Dominion. It was stated by Governor Musgrave to the Judges as an inducement to them before entering into Confederation that they were to be Dominion officers and Courts. It was incidentally brought up when the now repealed Circuits Act was being rushed through the House before the ink was dry; and was clearly enough stated and raised when Mr. Richard Woods, a Registrar of the Supreme Court and an Officer in Bankruptcy, and therefore an officer of the Dominion, was removed by the Province, an act protested against in more than one communication from the Judges, through the Chief Justice, to the Local and Dominion Governments, but never formulated as it has been now in the Thrasher case. I suppose the reason was the time was not ripe for a decision, the injury resulting to the public service from allowing it had not yet been practically exhibited. People go on in the old groove notwithstanding all kinds of radical changes, so long as it does not actually affect the little world of which each individual is the centre, and so it remains until as in this case some marked event in practice compels a close examination into cause and title.

But to return to Provincial Courts: —

By the operation of Section 129 of the British North America Act the status, jurisdiction and authorities of the Supreme Court and its Judges, as they existed at Confederation, was by that positive enactment handed down to us unimpaired in any respect, including the common law powers of the Judges to make Rules of Practice and Procedure, confirmed by the local Statutes passed before Confederation, particularly the "The Supreme Court Ordinance, 1869." The Attorney-General contends to the effect that this power ceased altogether on the 19th July, the day before Confederation, when British Columbia first became a complete representative Government. But that consideration would not affect the case one whit, inasmuch as if they had the power they did not exert it while they had it, for on the 20th July they went into Confederation with the Court and Judges in full vigor and power, as I have described them, and section 129 continued and confirmed Courts and Judges in

their prior estate and importance without the loss of a single particle of their power, status, jurisdiction or rights.

That is applying the positive test commanded by Regina vs. Burah. But where is there any section of the Act which gave in any similar manner back to the Province the control over this Court and its Judges and Procedure that is now claimed for it? There is nothing but section 92, sub-section 14, and that is always under the correction of the controlling force of section 91, which so many Canadian Judges of eminence have insisted on.

It is not my province on the present occasion to define with even approximate exactness the full meaning of the words "administration of "Justice" and "Procedure," but sufficient will be gathered from the authorities cited to-day to make it clear that while under section 91 and the various sections of the British North America Act, the Dominion has several large directly statutory (as well as constructive) powers over the administration of Justice, and can engraft its powers on its own Judicial Officers and Courts throughout the Dominion, such as this Supreme Court, and makes the Criminal law and criminal procedure entirely its own, the phrase Administration of Justice in sub-section 14 when applied to the Province must have but a very limited application. "Procedure" may be defined to include all the means and modes by which causes "proceed" to such a final decision as will procure the determination of the issues raised, and the rendering of complete justice in the case. The enactment of substantial law is, within statutory limits, within the competence of the local legislature; as what shall constitute a contract? What additional local Courts are wanted; when and where? and a host of other necessary provisions in aid of the meteing or ministering of Justice within the Province to all who claim the aid of the law. But all such local Courts must from the principles and decisions I have set forth necessarily be inferior to and under the revising supremacy of this Supreme Court It would, of course, include a power to see that Justice is properly administered, and when not, that a proper constitutional remedy should be applied; but the process and means by which Justice is to be administered in a Court not within the meaning of sub-section 14, must be left to the Judges of the Superior Courts themselves.

And here I note that the moment a Judge gets a Commission he steps at once into the possession of all the Common Law and other rights, powers and status which attach to the position, like an Officer of one of the Services stepping into a command.

As to what is procedure, Poyser vs. Minors, 7 L. R., Q. B. D., 333, 334, is a conclusive authority. Lord Justice Lush in delivering the judgment of the Court says:

"Practice in its larger sense, the sense in which it is used in the "English Judicature Acts, like 'procedure' as there used, denotes the "mode of proceeding by which a legal right is enforced, as distinguished "from the law which gives or defines the right, and which the Court is "to administer by means of the proceeding—the machinery as distin-"guished from its product."

Then quoting section 74 of the English Judicature Act of 1873 the Lord Justice goes on to say,

"In these sections the rules in the Schedule are regarded as Rules of "Court for regulating its practice and procedure and apart from statutory

"restriction, such Rules are within the competence of any Court to make "for itself."

Now the rules of procedure here spoken of cover all the same ground and matters and proceedings as the "Supreme Court Rules 1880" and a fortiori the "Amendments" to the Supreme Court Rules of 1880 and among these Rule 401 A, under which we are now supposed to be sitting as a Full Court. Consequently I consider that the Local Legislature were legislating on a matter not within their competence when legislating on the matter of the Procedure of the Supreme Court of British Columbia and which Poyser *vs.* Minors declares to be within the competence of any Court (meaning of course the Courts he was speaking about, the Superior Courts, the High Courts and Courts of Appeal, which answer to our Supreme Court) apart from statutory restrictions, to make for themselves. The Common Law right of the English Judges to make the Rules of Procedure in their own Courts has not been taken away by the Judicature Acts though the Imperial Parliament is really sovereign in the highest degree; which even the Dominion Parliament is certainly not. It declared and defined also whose presence should be necessary to make Rules and provided for their presentation to the House, but the general power of the Judges was carefully preserved throughout.

It was contended in argument in this case that local Colonial Statutes could alter the Common Law, and the Colonial Laws Validity Act was quoted in support. But assuming such to have been the case, here there was no exertion of the right thus claimed—but the very reverse for the local Act—Supreme Courts Ordinance, 1869, section 13, (saved by the subsequent Supreme Court Act of 1870) expressly confirms that inherent right in the Supreme Court and its Judges, which previous Acts had already declared, and in that state Confederation found the Court, and in that condition handed it down to us now, subject only to the rights of the Dominion, and such Courts and procedure as it should create and the legal obligations of the British North America Act.

It follows, therefore, as a logical consequence from Poyser *vs.* Minors as applied to the facts of this case, and the judicial construction of the British North America Act, that the local legislature were *ultra vires* in legislating on the procedure of the Supreme Court, and as a necessary consequence could not delegate a power which was itself beyond their own competence.

But assuming, arguendo, they had the power of legislating on this procedure direct, then by section 32 of the Administration of Justice Act of 1881, they would have made the Supreme Court Rules of 1880 into Statute Law, and have given the Lieutenant-Governor-in-Council power to report or alter that law.

That, I think, was *ultra vires*. Cooley on Constitutional Limitations, page 141, tells us that one of the settled maxims of Constitutional Law is that the power conferred upon the Legislature to make laws cannot be delegated by that Legislature to any other body or authority.

Where the sovereign power of the state has located the authority there it must remain; and by the constitutional authority alone the laws must be made, until the constitution itself is changed.

The power to whose judgment, wisdom and patriotism the high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon whom the power shall be devolved, nor can

it substitute the judgment, wisdom, or patriotism of any other body for those alone to whom the sovereign power has seen fit to confide it.

The exception which proves the rule is, that where there is an immemorial custom, as the delegation of limited powers of taxation to Municipal Corporations, that is not considered as trenching upon the maxim I have just declared *delegatus non protest delegare*. They are rather in the light of auxiliaries of the Government in the important business of municipal rule in respect of which the parties immediately interested may fairly be supposed more competent to judge of their need than any central authority. By parity of reasoning the Judges of a Superior Court who from immemorial custom have been in the habit of making rules for their own Courts, and as the parties more immediately interested may be supposed more competent to judge of their own needs than any central authority.

The local Legislature could not as a delegated or, even if considered a derivative power, and if possessed of power over procedure, subject as they were to the construction which the Canadian and English Judges have put on the British North America Act, have delegated that authority to a new body of men, as the Lieutenant-Governor-in-Council in this case certainly are. The clear and vigorous judgment of Chief Justice Hagerty in Regina *vs.* Hodge is a conclusive authority against such a position, although if they had had the power they could have relegated it to the Supreme Court Judges as the immemorial Common Law channel and depository of the power of making such Rules and Orders.

The 'Amendments' are not only defective in this principle, but also in form, not being carried out in the only form in which they could have had (under the construction of section 32 of the local Administration of Justice Act and section 17 of the British Columbia Judicature Act, 1879,) a chance of being effective, namely, by being issued in the shape of an Order in Council instead of a Report of a Committee of Council—though that could have been instantly remedied had there been no other objection to it by returning it to the Lieutenant-Governor in-Council respectfully soliciting the insertion of proper, operative words "it is ordered" and so forth.

But there are other defects in it, not only of form but of substance, e. g., 284a: application for a new trial to a Judge of a Judicial District; there being no such official in existence here. 285a. Rule of partial and local application on a general subject.

Order XI. Court of the District wherein the action has been commenced; there being none such.

Order LVIII. 399. altering the words of a statutory enactment by a mere rule.

400a. Limiting the statutory power of appeal; enacting substantive law by Rule and Order, instead of Act.

Now leaving the lower ground of legal inference and probability, legal comparison and conclusions thereon and deduction, section by section, let us try the proposition laid before us: that the Lieutenant Governor-in Council, i. e., the local Government, or even the local Legislature are the only proper persons to make Supreme Court Rules, Practice and Procedure by a higher standard.

Regarded in the higher light we shall be struck with the grave objections on the ground of principle, amounting absolutely to disqualification, in both these bodies, to the adoption of such a course.

It is a general principle of universal acceptance among jurists that the Legislative, Executive and Judicial departments of Government should be kept entirely distinct from each other; and the reason for this separation of functions is obvious. They are a constant constitutional and conservative check on each other. If the Legislature goes beyond its power in the enactment of substantive law, there is the Judicial department, an independent body, presumably well trained and experienced for the purpose, at hand to indicate the extent to which their powers lawfully go. If the Judiciary overstep the proper limits of their constitutional functions, there are first the Executive, where the law is clear to call attention to the excess and suggest, and if need be enforce, a return to the correct path. If the substantive law at issue be not clear, there is the Legislature at hand to remedy the defect, and clear the way for the smooth and harmonious working of Constitutional Government.

It is for the Legislature to make the law, the Judiciary to interpret it, and the Executive to execute it; and it is the acknowledged experience now of centuries in every civilized community on the globe, that those who have to interpret the law, whose daily study and avocation it is to ascertain and follow out all the best modes of carrying it out, should be charged with and responsible for the more immediate duty of declaring and defining the Procedure by which justice is in all cases to be obtained through the medium of the Court. If the Legislature and the local Government for such we must consider the Lieut.-Governor in Council to be concur in the enactment and carrying out of a measure which is in excess of their constitutional power—and that may readily happen with the most honest and patriotic intention—then so long as the Judiciary are distinct and free from improper control the error can be set right, and the mischief remedied or prevented. The local Executive are generally chosen out of the legislature, for their influence in that Legislature. They are therefore very likely, nay almost certain, to agree not only in the complete propriety of any given law they may enact, but in the execution of it. The importance therefore of keeping the third body, the Judiciary, sufficiently independent of local control to be able to exercise its proper functions distinct from either of the other two bodies, becomes a matter of paramount importance to every one who may possibly become a suitor in the courts; in other words, every inhabitant of the land. It is therefore the right of the suitor that these functions should be kept distinct from each other, and not be allowed to clash with, overlay, or destroy one another. The very case before us is a case in point. While an important trial involving a heavy amount of money is proceeding, Rules of Procedure are suddenly made by one of the Departments of the State above alluded to, whereby the previously existing right of rehearing (though with the ostensible intention of granting one) is suddenly cut off.

And this is the principle which is to guide us in the construction of the British North America Act, for Chief Justice Harrison in Leprohon *vs.* the City of Ottawa, 40 U. C. Q B. p. 487, comparing the constitution of the United States with our own under the British America Act, says,

"In each Constitution, that of the United States and ours, we see "traced in strong characters the separate functions of the Executive, "Legislative, and Judicial departments of government; and provision is "made in our constitution for the independent exercise of the executive

"and legislative functions not only by the central authority but by the "authorities of each Province."

Cooley on Constitutional Limitations, page 57, note, citing Webster, vol. III. There is no department on which it is more necessary to impose restraints than upon the Legislature. The tendency of things is almost always to augment the power of that Department of government in its relation to the Judiciary. After explaining the reasons of this, the power of the purse, political influence and so forth, and the mode in which this overshadowing influence insensibly grows, he concludes, "It "would seem to be plain enough that without Constitutional provisions "which should be fixed and certain, such a department in the case of "excitement would be able to encroach on the Judiciary."

In another place (page 115) the same American author in speaking of the powers of a Legislature and quoting Thompson J, in Dush *vs.* Van Kleck, Johns, 498, says. "To declare what the law is or has been is a judicial power, to declare what the law shall be is legislative."

"One of the fundamental principles of all our United States Govern-"ments is (and the same applies to Canadian Provincial Governments) "that the legislative power shall be separate from the judicial." Pomeroy, also a great authority in his Constitutional Law, page 71, says, "It is a "fundamental principle of the United States constitution (and the remark "applies with equal force to the British America Act) that the Executive, "Legislature and Judiciary are three distinct bodies not to be trenched "upon or destroyed by each other." And that being the general intent and spirit of our own Act, we are, I think, bound to apply that principle of construction to its provisions, deciding the matter before us on the high ground of its relation to a well understood principle of Constitutional law. On this ground therefore I consider that it is not legally within the competence of the local legislature to make or depute to the Lieut.-Governor in Council, or for the Lieut.-Governor in Council to make Rules and Orders for the Supreme Court of British Columbia, and had there not been several other valid grounds for arriving at the same conclusion I should be well content to rest my Judgment entirely on the application to the circumstances of the case of the above high principle of Constitutional law.

As the result of the various arguments and authorities on the question before us, and a careful consideration of the whole case, I cannot resist the conclusion that section 28 of the Local Administration of Justice Act, 1881, restricting the sittings of the Supreme Court for reviewing nisi prius decisions, is unconstitutional; and that the local legislature has no power to regulate the procedure of these Supreme Court by making Rules or otherwise. or to delegate the power of so doing to the Lieut.-Governor in Council, such power residing in the Supreme Court alone, by virtue of the common law and statutory enactment previous to going into the Union, subject alone to the provisions of the British North America Act, and sections 129 and 130 thereof. And I further consider that the Local Legislature has no power to diminish or repeal the authorities or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office whether as to residence or otherwise by the Judges thereof.

GRAY, J.—

In July, 1880, the American ship Thrasher loaded at Nanaimo with coal. On leaving port the Defendants were engaged to tow her out. In so doing, owing, as the Plaintiffs allege, to mismanagement on behalf of the Defendants, she struck upon a rock a short distance from the entrance to the harbor, had to be abandoned, and was lost. Ship and cargo valued at $80,000. Suit was commenced on the 18th of October, 1880. Issue joined and notice of trial given on the 29th of April, 1881. Trial took place before the Chief Justice at Victoria, on the 27th, 28th, and 29th June, 1881. A special verdict was returned in favor of Defendants. Several objections were taken by the Plaintiff's counsel to the charge of the Chief Justice to the Jury. Leave was given to move for a new trial and a hearing in Banc on points reserved and for misdirection. That leave has from time to time been extended, and the right to hear the motion is now the question to be decided.

In order to understand how so simple a matter of procedure can be involved in difficulty, it is necessary to review the local legislation which created it.

In September, 1878, an Act passed by the local Legislature to make further provision for the Administration of Justice," c. 20, 1878, authorized the Governor-General to appoint two new Judges to the Supreme Court of British Columbia, and without abolishing them transferred the business of the County Courts to the Supreme Court.

In April, 1879, "An Act to amend the Practice and Procedure of the Supreme Court of British Columbia and for other purposes relating to the Better Administration of Justice" called "The Judicature Act of 1879" was passed, introducing into the Province to a certain extent the changes then lately made in England; but the duty of making the Rules to carry those changes into effect was devolved upon the Lieutenant-Governor-in-Council instead of upon the Judges of the Court according to old and immemorial usage. The whole Act was not to come into force until proclamation to that effect duly made—but that part as to making the Rules was to take place immediately.

At the same session in April, 1879, an Act termed "The Judicial District Act, 1879" was passed dividing the Province into districts and enacting that the Judges of the Supreme Court should severally discharge their duties and reside in the district assigned to them. This Act also was only to come into force by proclamation.

In March, 1881, an Act to carry out the objects of the Better Administration of Justice Act, 1878, and the Judicial District Act, 1879, was passed, called the "Local Administration of Justice Act, 1881," (Chapter 1). This Act made some slight alterations in the provisions as to districting the Judges, and declared it lawful for the Governor-General by order in Council to direct that the Judges of the Supreme Court should severally reside and usually discharge their duties in the defined districts, except in cases of inability or incapacity, when the nearest was to discharge the duties of the incapable Judge in addition to his own.

It then proceeded to regulate the procedure of the court in many minute details. It declared valid the "Supreme Court Rules, 1880," made under authority of the Judicature Act, 1878, by the Lieutenant-

Governor in Council as modified by that Act (Chapter 1, 1881) and gave the Lieutenant-Governor in Council power to "vary, amend or rescind "any of the said rules or make new rules not inconsistent with the "Act for the purpose of carrying out its scope and aim, and that of the "Better Administration of Justice Act, 1878," and by a distinct section enacted that "the Judges of the Supreme Court should sit together in the "City of Victoria as a Full Court, and such Full Court should sit only once "in each year at such time as may be fixed by Rules of Court." This Act was also to come into force by proclamation.

The Judicial District Act, was on the 9th of June, 1881, proclaimed to come into force on the 27th June, 1881, and the Local Administration of Justice Act on the 28th June, 1881, on which day the Full Court was sitting and rose.

There was no saving clause in these Acts as to any pending proceedings, and thus so far as they were legal, being matters of procedure, their provisions applied to the plaintiff's case on trial on that very day and the day following the 28th and 29th June, and he was thereby arbitrarily deprived, without reason or fault of his own, of the common right incident to all suitors in a British court, of having the ruling of a single Judge at *nisi prius* in a heavy cause of this nature, reviewed without unnecessary delay by the Full Court, an injury difficult to estimate in such a case where the witnesses were principally seafaring men.

The plaintiff's counsel being dissatisfied with the ruling of the Chief Justice, who tried the cause, obtained a stay of *postea* and immediately applied for a hearing before the Full Court. The learned Chief Justice felt himself restrained by the section 28 before mentioned, but facilitated plaintiff's application to the Supreme Court of Canada at Ottawa. There a hearing was refused on the ground that the court of last resort in the province had not dealt with the question.

Plaintiff's counsel then again applied for a sitting of the Full Court, as he contended under its common law right and immemorial usage to expedite the claims of suitors. Pending the consideration of that application the Lieutenant-Governor in Council, under the alleged power of section 32 of the Local Administration of Justice Act, 1581, promulgated a new Rule ordering a sitting of the Full Court in Victoria on the 19th of December. On that day the Judges met in deference to the order of the Lieutenant-Governor in Council and called the attention of the counsel in the cause and the Attorney-General to the fact, that that order was inconsistent with and in direct antagonism to section 28, the Court having already sat within the year, and that where an alleged Rule of Court conflicted with the direct enactment of the statute, for the purpose of carrying out which it was authorized, and under which it was made, the enactment must prevail.

The counsel for the plaintiff thereupon contended that the legislation and enactments referred to were *ultra vires* and unconstitutional on various grounds, which for the sake of precision may be reduced to the following heads:—

1st. That the Supreme Court did not come under the designation of a Provincial Court within the meaning of sub-section 14, section 92, and that consequently the local Legislature had no right to regulate its procedure.

2nd. That if the local Legislature had power to make rules regulating the practice and procedure of the Supreme Court, it must itself

make the rules, and could not delegate the power of so doing to the Lieut.-Governor in Council or to any other parties than the Judges themselves—according to old and immemorial custom and usage.

3rd. That the Dominion Government having a legal right to utilize the Supreme Court in this Province for the enforcement of Dominion laws and rights, legislation by the local legislature which impaired, prevented or interfered with that right, was unconstitutional and *ultra vires.*

4th. That the legislation and enactments in question, both as to the sittings of the Court, the rules of the Court, its procedure and practice, and the localizing, the Judges were unconstitutional and *ultra vires.*

5th. That the Court had still the power, *ex mero motu*, to sit in banc and hear arguments on points reserved and raised at *nisi prius*, or otherwise in proceedings in the Court, at such times as would promote the rights of suitors.

6th. That the plaintiff having acquired vested rights by the institution of his proceedings, could not be affected by *ex post facto* legislation.

On behalf of the plaintiff, by agreement with the Attorney-General, the learned counsel was heard on these points, and the Attorney-General as *amicus curiæ* in reply:—The counsel for the defendants in the interests of their clients having declined to take any part in the argument, being perfectly content with matters as they were. On the 19th December the Chief Justice handed to the Attorney-General a memorandum of certain points he thought deserving of consideration, and the argument was continued on the 5th, 13th, 16th and 17th of January.

The Judges now severally deliver their opinions.

The questions involved are of the utmost importance as affecting the administration of justice and almost of the Dominion itself. For if the "omnipotence" claimed for the local Legislature be conceded, all Dominion legislation is futile; Dominion rights only nominal, and the Dominion itself not superior to, but simply a subordinate part of British Columbia.

As must necessarily be the case the discussion turns mainly on the 91st and 92nd sections of the British North America Act, 1867. This Act has hitherto been considered by all Courts, all Judges, all statesmen and public men, as a new departure in the constitution of Canada as well as of the several provinces forming the Dominion.

The authorities are so numerous that the position may be assumed as a recognized axiom of constitutional law when applied to Canada or its constituent parts. Says Chief Justice Hagarty in Leprohon *vs.* the City of Ottawa: "We must take the Confederation Act as a wholly new "point of departure. The paramount authority of the Imperial Parliament created the now existing legislatures; defining and limiting the "jurisdiction of each. The Dominion Government and the Provincial "Governments alike spring from the same source."

I do not propose to discuss at any length the antecedent history of the Supreme Court of British Columbia, its powers or incidents. Whatever they were, when British Columbia went into the union she surrendered them for good consideration to the General Government and received back exactly what is defined in the British North America Act—nothing more, nothing less She went in subject to all of the provisions of the British North America Act, applicable to the Province. Not only

is this the necessary consequence of going into the union, but it is expressly declared so to be intended by the 48th section of the Local Constitution Act, 1871, (consolidated statutes, chapter 42, section 83,) passed by the Local Legislature in contemplation of such union, viz:

"If the projected Union of this Colony with the Dominion of Canada shall be carried into effect, this Act shall be construed after this Colony has been so united as aforesaid, anything hereinbefore contained to the contrary notwithstanding, as being subject to all the provisions contained in the "British North America Act, 1877," which may by such union become applicable to this Colony, and to the provisions contained in any Order of Her Majesty in Council for the admission of this Colony into such union as aforesaid, under the authority of that Act, and to the provisions contained in any Act of the Parliament of the Union Kingdom of Great Britain and Ireland, made for the the purpose of effecting such union as aforesaid, or to any other provisions framed by competent authority, other than already mentioned, for such purpose."

What, then, bearing on this question, did she receive back? Subject to the controlling power of the 91st section and the general tenor of the whole Act, she received by the 92nd section, sub-section 14, the exclusive power to legisate as to "The Administration of Justice in the Pro-"vince, including the constitution, maintenance and organization of "Provincial Courts, both of Civil and Criminal jurisdiction, and includ-"ing procedure in civil matters in those Courts."

Standing by itself as a distinct Province, bound by no controlling connection with any other or higher authority, the powers in this sub-section would without question give an absolute dominant Provincial control; but read with the whole of the British North America Act, they must be read as affected by and subject to the general objects, uses and powers for which the Union was made, and for maintaining which efficiently that Act was passed. If by the terms and conditions embraced in the Act the General Government can use for Dominion purposes Courts in the Province—but Provincial only in the sense that their sphere of duty is confined to the territorial limits of a Province; the Province cannot so legislate as to render those Court inefficient, and admitting that the Province can use the same Courts for its local purposes this power only gives to the instrument a conjoint character, preventing its reduction to inutility by either, and renders the preservation of its efficiency the more distinct, when the expense of maintenance is shared by both parties, and the appointment of the directing hand given exclusively to the one which can use it for the general purpose. This principle was recognised in Leprohon *vs.* The City of Ottawa, 2 Ont. app. C. 522 where it was held that the power of taxation by the Local Legislature did not extend to those means or instruments employed by the Dominion Government to carry into effect the powers conferred upon that body. The same reasoning would render unconstitutional the possession or exercise of a power by the Local Legislature to render inefficient courts the Dominion Government was entitled to use to carry into effect the powers conferred upon it.

Valin *vs.* Langlois, clearly decides that the Dominion Parliament may utilize the Superior Courts in the Provinces for the purpose of enforcing Canadian laws enacted by that Parliament within the scope of the Legislative power given to that Parliament by the British North America Act, 1867, a view which had been recognized and acted upon by this

court previous to that decision. The true character and position of these courts are so clearly defined by the Chief Justice in Valin *vs.* Langlois that it almost renders argument unnecessary. "They are not," he says "mere local courts for the administration of the local laws passed by the "Local legislatures of the Provinces in which they are organized. They "are the courts which were the established courts of the respective Pro- "vinces before confederation, existed at confederation, and were con- "tinued with all laws in force, as if the Union had not been made by the "129th section of the British North America Act and subject therein as "especially provided, to be repealed, abolished or altered by the Parlia- "ment of Canada, or by the legislatures of the respective Provinces ac- "cording to the authority of parliament or of that legislature under this "Act. They are the Queen's Courts, bound to take cognizance of and "execute all laws whether enacted by the Dominion Parliament or the "Local Legislatures. Provided always such laws are within the scope of "their respective legislative powers."

A higher authority or a better definition we could not have.

The Federal Government by Parliamentary authority appoints, pays and removes the judges as pointed out by Imperial and Dominion Legislation. The Local Government merely provides the subordinate officers and local machinery. Without a judge there can be no court, and the Local Government cannot appoint one to that court. The Supreme Court of British Columbia cannot therefore be exclusively a Provincial Court. By the effect of the British North America Act it becomes a Federal Court, acting within a defined territorial jurisdiction, and as incident thereto for the purpose of its existence and efficiency in carrying out both the Federal and Provincial laws, cannot be controlled in such a way by local legislation, in regard to procedure or otherwise, as to render its action ineffectual. It was so intended by the British North America Act, in order that the Administration of Justice, and the judges themselves might be uninfluenced by local, political or personal considerations. Under the 129th section, the Canadian Parliament adopted the Court with its power and authorities as existing previous to confederation, clothed it with combined duties, and increased jurisdiction, to carry out as the law of the land in civil as well as in criminal matters, statutory enactments made beyond the territorial limits of the Province, rendering their operation compulsory, not operative through comity only, and preserves the Court, subject only to be abolished, altered or affected by the Dominion Parliament or the local Legislature, as the British North America Act permits.

The 14th sub-section is divisible. 1st. It confers on the Local Legislature the exclusive power of making laws relative to the administration of justice in the province. That power it has been decided means limited to the matters on which the Local Legislature can constitutionally legislate, that is as defined in the 92nd section, otherwise the whole Dominion legislation so far as it has to be carried out in the Province might be rendered nugatory. 2nd. It confers the power of constituting, maintaining and organizing "Provincial Courts" both of Civil and Criminal Jurisdiction. If, therefore, the Supreme Court of British Columbia be a Provincial Court in the limited meaning of being organized and maintained by the Province, the local Legislature may so restrict its powers as entirely to prevent the enforcement of Dominion Legislation on the very matters over which the British North America Act gives the exclu-

sive power to the Dominion Parliament, and thus paralyze the action of the Federal Government in the Province. 3rd. It confers the power of legislating as to procedure in civil matters only in "those courts," that is the Provincial Courts, the Courts the Province constitutes, maintains and organizes, otherwise again it may render abortive the enforcement of Dominion Laws on the matters confided to the Dominion Parliament and by that Parliament deemed necessary for the good government of Canada, e. g., if it can say the Supreme Court shall sit only once a year, it may equally say it shall sit only once in five or ten years, and thus, this being a matter of procedure, every step taken to enforce a Dominion Law in Civil matters be comepletely nullified. This power pure and simple is claimed to its fullest extent for the Local Legislature. It cannot be conceived that the Constitution intended anything so inconsistent—that the Dominion Government should pay for Judges, and largely bear the maintenance of Courts over which it has no control, and which may at any moment be used to neutralise Dominion Legislation.

The 90th, the 99th and the 130th sections distinctly make its Judges officers of the Dominion.

The Provincial Courts—by this section intended—it is submitted, are those of which the Province bears the entire expense, and has the sole control, similar to the State Courts in the United States; though owing to the difference in the constitution of the two countries the jurisdiction of such Provincial Courts could not be co-extensive with that of the State Courts.

In such a view there is nothing that conflicts with the strictissimis verbis of the 14th sub-section, while it makes reconcilable the general operation of the whole British North America Act, and preserves the unity of its various parts. The British North America Act contemplated and effected the transfer from the Provinces to the Dominion of all properties, institutions, and powers that were essential to the good government of Canada. By the 107th and 108th sections the public funds and public properties were transferred. By the 129th section and the limitation of the powers of the local Legislatures in the 92nd section; and the 91st, the 96th, the 99th and 100th sections, the control of the Superior Courts passed to the Dominion to be exercised when and as the public interests required.

As repeated time after time in Valin *vs.* Langlois, (3 Supreme Court Can., R., page 1, you are to look at the whole of the British North America Act for its meaning. It surely cannot be successfully contended that after conferring the great powers that Act conferred upon the general Government and Parliament for the public interest, it meant to take them all away again, or to place it in the power of a subordinate Legislature to do so, and to disarrange the whole machinery of the Dominion Administration of Government by the words used in the 14th subsection of section 92.

In view of this 129th section, it may be desirable briefly to refer to the organization of the Supreme Court of British Columbia, as it existed at the time of the Union with Canada. By the Supreme Court Ordinance, No. 113, March, 1869, provision was made for the merger of the then two existing Courts called the "Supreme Court of the Mainland of British Columbia" and "the Supreme Court of Vancouver Island" into one Court to be called the "Supreme Court of British Columbia," and

for the appointment of a Puisne Judge, and that all the jurisdiction, powers and authorities of the two then existing Supreme Courts, and of the Judges thereof, should be vested in, and should be had, exercised and enjoyed by the said Supreme Court of British Columbia and the Judges thereof. By the 13th section of that Ordinance the Chief Justice of the new Court was authorized and empowered from time to time to make all such Orders, Rules and Regulations as he should think fit for the proper Administration of Justice in said Supreme Court, and, subject to such Orders, Rules and Regulations, the existing Rules of the Court of the Mainland should have full force and effect in the said Supreme Court of British Columbia. By No. 120, 9th March, 1869, "An Ordinance to amend Civil Procedure," provision was made repealing the Vancouver Island Civil Procedure Act, 1861, and introducing certain parts of the Common Law Procedure Acts, 1852 and 1854, and of the Statutory enactments regulating the Practice, Pleadings and Procedure of the High Court of Chancery, and by the 5th section of this last-named Ordinance, the Judge of either of the said Courts was empowered from time to time, with the approval of the Governor for the time being, to make general orders modifying such procedure at Law or in Equity in the Court in which he presided.

By an Act passed in April, 1870, (chap. 54, Consolidated Statutes) the merger of the two Courts was declared to have taken place on the 29th March, 1870, and by section 4, the last named Act transferred all the business then pending in both Courts to the new Supreme Court, and preserved the provisions of the Ordinance, No. 113, 1869, called the Supreme Court Ordinance, 1869, just referred to. Such were the relative positions of the Supreme Court and the local Legislature at the time of the Union on the 20th July, 1871.

The Legislature had at that time by positive legislation made the English Practice and Procedure the Law of the Province to a certain extent, and left to the Judges the duty and power of making the Rules or Regulations necessary to carry on the business of the Court in all other respects, than as declared or set out in the English Practice and Procedure to the extent so introduced.

By the 129th section of the British North America Act all Laws, Courts, Commissions, Powers and Authorities were to continue until altered by competent authority. What authority? The power of the local Legislature is by the 92nd section limited to the defined subjects over which it has exclusive power. The Dominion Parliament cannot touch the subjects over which such exclusive power exists; but the Dominion Parliament itself is not limited to the subjects defined in section 91. It has exclusive power over all subjects to which the exclusive power is not given by section 92 to the local Legislature.

Again, to quote the language of the Chief Justice in Valin *vs.* Langlois: "This may be termed a Constitutional Grant of Privileges and "Powers which cannot be restricted or taken away except by the author-"ity which conferred it, and any power given to the Local Legislature "must be subordinate thereto." It was decided in that case that the Dominion Parliament had the right to utilise the Superior Courts of the Province, and to legislate as to the Procedure in those Courts, in the civil matters in which it so determined to use them. If so, the Local Legislature has not the exclusive right to legislate as to Procedure in civil matters in those Courts.

The "procedure" therefore in that sub-section 14 specified must have reference to Courts in the Province, over which the Local Legislature of the Province has exclusive control, because,ex-rationi, if the Dominion Parliament has a power to Legislate as to procedure in civil matters in certain courts in the Province,those must be courts over which the Local Legislature has not the exclusive power to Legislate as to procedure.

It is a clear canon as to the construction of statutes, that you must give force and effect to every word, as far as it is possible. The governing words in this subsection, and section 92, as bearing on this sub-section, are "exclusively" and "those Courts." They are thus "linked" and the character of the court is clearly specified.

The general authority conferred by 91, being to legislate on all matters not coming exclusively within 92, thus pertaining to the Dominion Parliament, the 129th section steps in, authorizing legislation as to the existing Courts in the Province, by the Parliament of Canada or the local Legislature, as one or the other under the British North America Act may be entitled.

The Parliament of Canada has legislated upon the subject, has by imposing certain duties upon the Supreme Court for Dominion purposes in matters connected with the Civil Administration of Justice in the Province altered the constitution of that Court, increased its jurisdiction, and expressly shewn by legislative enactment that it is not a Court over which the local Legislature has the exclusive power to legislate. The exercise of this power has by the Supreme Court of Canada in Valin *vs.* Langlois, been declared constitutional. In furtherance of the observations of the Chief Justice, Mr. Justice Fournier referring to the extensive powers given to the Federal government over these Courts by the 129th section says: "Could stronger or fuller language be used to give "jurisdiction over these Courts? I think not! The effect of this sec- "tion to which they owe their very existence is evidently to place them "under the legislative power of the Federal Government, as well as it "is true under that of the local Government, and to make them, in fact, "common to both these Governments, for the administration of the laws "adopted by them within the limits of their respective powers."

Mr. Justice Henry: "The whole purview of the Act, with a proper "consideration of its objects, is evidence of its policy to limit local legis- "lation to those civil rights in the Province not included specially, or "otherwise in the powers given to the Dominion Parliament." As to sections 13 and 14,—"Guided, by the purview of the whole Act, deduct- "ing the indirect and incidental powers of legislation given by the Act "to Parliament,the local Legislatures have the exclusive right to legislate "only in regard to the remainder. The 14th sub-section gives local "authority to deal with the administration of Justice in the Province, "in regard to the subjects given by the Act. And to that extent only to "provide for the construction,maintenance and organization of Provincial "Courts, in reference to those and kindred subjects. The words 'Pro- "cedure in Civil matters in those Courts' must be considered with the "context and with the objects and other provisions of the Act." (77)

Mr. Justice Taschereau says: "The Administration of Justice is "given to the Province, that is true; but that cannot be understood to "mean all and everything concerning the Administration of Jus- "tice." (81).

Mr. Justice Gwynne is equally decided.

As the local Legislature cannot supersede the action of the Dominion Parliament, it cannot deprive the Court of the character thus given to it by such legislation, or the Dominion Parliament of the use they may make of it. If so, it has no exclusive control, and if it has not exclusive control it cannot legislate as to that Court's procedure, because by the 91st section, what it cannot exclusively legislate upon the Dominion Parliament alone has the exclusive power to legislate on. If these terms, so used in the 91st and 92nd sections, are to have any legal meaning, they negative a joint authority It is the logical sequence, that if the local Legislature alone has power to legislate on matters coming within 92, and the Dominion Parliament has legislated on the duties and procedure of the Superior Courts in the Province, and that legislation has been declared constitutional, then those superior Courts cannot come within the class embraced in sub-section 14, section 92, because with reference to that class the local Legislature, having the exclusive power, the Dominion Parliament cannot legislate. The action, therefore, of the Dominion Parliament and the Judgment of the Supreme Court of Canada, amount to a Legislative and Judicial declaration to that effect.

The term "exclusively," in 92, it must be borne in mind, has reference to, and is legally a part of every sub-section, and every subdivision of a sub section, and therefore applies to each of the sub-divisions into which the sub-section can be divided.

It cannot be contended that in the same Court on the same subject, the rights of suitors in Civil matters, there can be two different Rules of Civil procedure, that you can say to one: Your case shall be heard immediately, and as often as your business requires, because the redress you are seeking springs out of Dominion legislation; but to the other, You cannot be heard, for one, five or ten years, because the debt you seek to recover pertains, so far as procedure goes, to the control of the local Legislature. Yet such must be the case, if one or the other has not the exclusive power, the Dominion Parliament or the local Legislature.

If a Provincial Legislature positively enacts, that on a particular subject, and in a Provincial Court, within its legislative jurisdiction, and under its exclusive control, a particular course shall be adopted, the suitor may or may not avail himself of that Court. But to adjudge that in the only Court to which he can resort, a Court used for Dominion as well as Provincial purposes, and in which the Dominion Parliament has constitutionally exercised the right of regulating procedure, he may be so used, is introducing an element entirely at variance with an impartial administration of Justice, and one never contemplated under the British North America Act. The procedure in such last-named Court must be either under Dominion or Provincial control, and the former has legally assumed it. Nor is this assumption limited merely to matters of Dominion Legislation. The Supreme and Exchequer Courts Act, c. 11, 38 Victoria, A. D. 1875, is especially created and clothed with power for hearing and granting appeals, not only in matters over which the Dominion Parliament has power to legislate, and arising out of laws and proceedings with which the Dominion Parliament and Government alone are connected, but also for hearing and granting appeals in matters falling strictly within the purview of the administration of Justice in civil matters assigned to the local Legislature under section 92.

The 11th section of that Act restricts the appeal to an appeal from the Court of last resort in the Province where the Judgment was rendered in such case, and by the 17th section enacts that "subject to the "limitations and provisions hereinafter made, an appeal shall lie to the "Supreme Court from all final Judgments of the highest Court of Final "Resort, whether such Court be a Court of Appeal, or of original juris- "diction (now or hereafter established in any Province of Canada) in "cases in which the Court of original jurisdiction is a Superior Court."

Here is a clear statutory right given to suitors (defined as to the mode of Procedure by which it is to be obtained from its inception in the Court of last resort in the Province to its hearing in the Supreme Court of Canada) to an appeal from the Superior Court of the Province in all final Judgments, not judgments limited to matters springing from Dominion but equally from local legislation.

By the first Act of the Dominion Parliament passed in that same session, C. I. 38 Vic. 1875, 2nd section, it is enacted as an amendment to the 18 the subsection of section 7 C. I. 1867, the "Interpretation Act" that the term Superior Court shall in the Province of British Columbia denote "The Supreme Court of British Columbia."

Thus in the Supreme Court of British Columbia we have enforce a Dominion statute regulating procedure even to staying an execution in the sheriffs hands in matters arising or that may arise out of Local Legislation. How then can it be said, that this Court comes within the class of Provincial Courts, over which the exclusive power is given to the Local Legislature to legislate as to procedure, when if so, that Legislature may take away from the suitor, as by its action in the present case, if legal it has done, the very highest right conferred upon him by the Dominion Parliament?

The inference is irresistible, that this superior Court, with jurisdiction to deal in civil matters arising from Provincial as well as Dominion Legislation, was by the Parliament considered as not coming within the class of courts specified in the 14th subsection and therefore not under the control of the Local Legislature as to procedure, and it was so considered by the Parliament of Canada, because it was essential to the good government of Canada as affects the administration of Justice that it should be so.

This view again is in accordance with the principle laid down in the Queen vs. Burah 3 L. R. ap. Ca. 889. In order that an Act passed by the Local Legislature should be valid, it must be within the powers expressly limited by the act of Parliament which created it. Within those limits its powers are no doubt plenary, but it can do nothing beyond the limits which circumscribe those powers. Apply the limitation here. Such subjects as being exclusively given to the local legislature the Dominion Parliament cannot legislate upon. Whatever, therefore, the Dominion Parliament can constitutionally legislate upon must be beyond those limits, and, therefore, the local Legislature cannot legislate on the same subjects.

Though this local legislation be pronounced unconstitutional, the Court itself for the purpose of the administration of Civil Justice in the Province is not left without ample power of Procedure. What it had at the time of the union, under the 129th section, still remains, and for what may be required the existing law of that date still continues which gave power to its Judges to make rules, besides the inherent power in

Courts of superior Jurisdiction at common law independent of any statutory authority to govern their own procedure in the interest of suitors—(Morris *vs.* Hancock, 1 Dowlings N. S. 323, Exparte Strong, 8 Excheq. 199. Bartholemew *vs.* Carter, 3 Scott, N. S., 529 3 M. & G. 135), a power which it must be assumed the Dominion Parliament and the Supreme Court of Canada recognised when under the reservations in the British North America Act, the Supreme Court of British Columbia was taken from the exclusive control of the local Legislature as to Civil Rights and Procedure.

The local Legislature by its own act, and by the legal operation of the 129th section, gave the power it possessed over that Court to the Dominion Parliament, and the Dominion Parliament by legislating on the subject accepted it. The power still exists, but transferred to other hands, and the Local Legislature has not the exclusive power of legislation as to the procedure of that Court, and if not exclusive, none.

It was intimated by very high authority in Severn *vs.* the Queen, S. C. C. R. 71, that it could not be supposed that the Local Legislature would legislate save for a legitimate purpose. The same idea has also elsewhere been often expressed, and is doubtless theoretically correct; but in Leprohon *vs.* the City of Ottawa, Ontario Appeal Court, Vol. 2, 563, Mr. Justice Patterson takes a view somewhat more in accordance with human experience and human nature. "There is no security," he says, "that in the exercise of a power which is capable of being used "to the detriment or embarrassment of the Central Government, the "Provincial Legislature will always be guided by a judicious regard for "the harmonious working of all the departments of the Constitution. "What motive may be found sufficiently powerful to lead to antagonis-"tic legislation or whether any such motive may arise, or whether from "caprice, or from crude theories of political economy, or from any cause "whatever, the power now in dispute may be exercised in a vexatious "manner must be a matter of speculation."

That exceedingly plain, common sense language finds a not inapt illustration in the case before us: The Judicature Act, 1879, was passed for a good object in the interests of suitors to simplify legal proceedings and expedite business. By its 4th section it abolished the terms into which the legal year was divided, and declared that, subject to Rules "of Court, etc., the Supreme Court and the Judges thereof shall have "power to sit and act, at any time and at any place for the transaction "of any part of the business of such Court, or of such Judges or for the "discharge of any duty which by any Act of Parliament or otherwise is "required to be discharged during or after term."

It then gave power to the Lieut.-Governor in Council by section 17 to make Rules of Court. "To regulate the sittings of the said Supreme "Court as a full Court or otherwise, and of the Judges thereof, sitting in "Chambers, and for regulating the vacations to be observed by the "Court and the officers thereof."

Under this Act, Rules of Court called Supreme Court Rules, 1880, were made and promulgated on the 16th October, 1880, to come into force on the 15th Nov., 1880, and among them several regulating the sittings of the Supreme Court, namely:

1. Save as by the Act or these Rules is otherwise provided, every action, proceeding, or matter in the Supreme Court, and all business arising out of the same, shall, so far as is practicable and convenient, be

heard, determined, and disposed of before a single Judge sitting in Court or in Chambers, as circumstances may require; and in Victoria such sittings in Court or in Chambers respectively shall, so far as is reasonably practicable, be held continuously throughout the year or as often as the business to be disposed of may render necessary.

2. A Full Court shall consist of not less than two Judges of the Supreme Court sitting together, and shall, besides exercising the jurisdiction assigned to it by the Act, hear and determine appeals, or applications in the nature of appeals, from any judgment, ruling, or order of a single Judge, excepting orders mentioned in Section 8 of the Act; and shall hear and determine Special Cases where all parties agree that the same be heard before a Full Court.

3. Sittings of the Full Court in Victoria shall be held as often as the business to be disposed of may render necessary.

4. All appeals to the Full Court shall be by way of re-hearing, and shall be brought by notice of motion in a summary way. The appellant may by the notice of motion appeal from the whole or any part of any judgment, ruling, or order, and the notice of motion shall state whether the whole or part only of such judgment, ruling, or order is complained of, and in the latter case shall specify such part.

By an act passed on 25th March, 1881, C. 1, called, "The Local Administration of Justice Act, 1881," section 10, the section 4 of the Judicature Act of 1879 (heretofore quoted) is amended by substituting in lieu of the part therein as to the sittings the following. "Subject to the Rules "of Court and the Provisions of this Act, and of the Judicature Act, 1879, "the Supreme Court and any Judge or Judges thereof shall have power "to sit and act at any time and at any place for the transaction of any "part of the business of such court or of such Judges or for the discharge "of any duty which by any Act or otherwise would heretofore have been "or is required to be discharged during or after term."

By section 32, "The Supreme Court Rules, 1880," (it is enacted,) "shall, as modified by this act be valid, and the provisions of any Act or "ordinance inconsistent therewith are hereby repealed and the Lieut.-Gov-"ernor in Council shall have power to vary, amend or rescind any of the "said Rules, or make new Rules provided the same are not inconsist-"ent with this Act for the purpose of carrying out the scope and aim of "this Act and the Better Administration of Justice Act 1878. The said "Rules need not be uniform, but may vary as to different districts in the "province as circumstances may require, and section 17 of the Judi-"cature Act 1879, with respect to Rules of Court shall continue to be in "force subject to said Proviso."

Conceding for the sake of argument that the Local Legislature has power to regulate the procedure of the Supreme Court, it is plain that under the amendment to section 4 of the "Judicature Act, 1879," and the "Supreme Court Rules, 1880," assumed and made valid by legislative enactment in this section, the Supreme Court could sit to expedite business whenever required, but contemporaneously with this same section and in the same Act, section 28, says: "The Judges of the Supreme Court shall have power to sit together in the City of Victoria, as a full Court and any three of them shall constitute a "quorum, and such "Full Court shall be held only once in each year at such times as may "be fixed by Rules of Court, and such Court shall constitute a Full

"Court." This of course is directly contradictory to the Rules just previously adopted and made statutory by Legislative enactment.

Under the power in the 32d section to make new Rules not inconsistent with this Act, a Rule was made to hold a full court on the 19th of December, *i. e.* within six months after the previous Full Court had been held. Being in direct violation of the positive enactment in the very statute which authorised the Rule to be made, even were there no other grounds of objection, it could not be made operative. (Cockburn, Ch. J., Christ Church College *vs.* Martin L. R. 3 Queen B. Div. 29.)

To summarise the legislation under this statute, if legal, it would be an order to the Supreme Court. 1st, To sit continuously. 2nd, to sit only once a year. 3rd. To sit more than once a year, if "not inconsistent" with the enactment to sit only once a year.—It is difficult to bring such legislation within the assumption expressed in Severn vs. the Queen. It seems more naturally to fall within the view expressed by Mr. Justice Patterson in Leprohon vs. the City of Ottawa. It was contended that the act was not retrospective, and therefore the Court could sit on the 19th December, but these provisions being matters of Procedure the Act in that respect was retrospective, and the court clearly could not sit. (Poyser vs. Minors, 5 L. R. 7, Q. B. Div., 339.)

This power of suspending the Sittings of the Court for any period at the will of the local Legislature, or by rules made under an assumed delegated authority from the Legislature, and absolutely controlling its procedure is no light matter, "If the power exists at all" (as says "Mr. Justice Burton, with reference to taxation in Leprohon's case) it can be "exercised to any extent, and in the event of any Province being "disatisfied with the Dominion Government it would hold in its hands "a weapon to which it might resort to harass the Government and enforce "its demands."

It is a question of principle, not of degree, and in this instance is in violation of the rights of Suitors under Magna Charta, "*nulli negabimus "aut differemus justitiam vel rectum.*" As also of the right and duty of the Court to advance appeals, where irreparable damage may be caused by delay. (Lazenby *vs* White. L. R. 6 Chan. ap. 89. London & Chatham & Dover Railroad Company *vs* The Imperial Mercantile Credit Association. L. Rep. 3 Chan. ap. 231.)

Yet this power of legislation to the most unlimited extent is claimed for the local Legislature, even to that of direct antagonism to Dominion legislation, under the authority (the Attorney-General contends) of Mr. Justice Fisher's words in Steadman *vs.* Robertson, New Brunswick Reports, "All the powers possessed by the Legislature of New Brunswick "still exist as potential as ever," but (he omits the learned Judge's qualification) "they are distributed between the Parliament and local Legis- "lature, and are exercised in each according to the limitations of the "constituting Act." This qualification so clearly refutes the pretension that it is unnecessary further to notice it.

Equally unavailing to sustain the claim is the assertion that the Judges themselves are Provincial officers and thus shew conclusively the Provincial character of the Court. Apart from the distinct provision in section 91, sub-section 8, and the concluding paragraph of 91, and the direct words in the 96th, 99th and 130th sections, in Leprohon's case (2 Can. Ap. 526) we find it laid down: "Provincial officers are those "over whose salaries the Province has control," and at 537, "The officers

"of the Dominion do not exercise their functions within the bounds of "any Province by the permission of the local Government. They are "there by authority of a higher power. The Province has no sovereign- "ty over them or their salaries as existing by its authority, or introduced "by its permission." If the right here contended for could be sustained, equally could the Dominion Government interfere with the Provincial officers appointed and paid by the local Government and Legislature, a doctrine too unconstitutional to be thought of. The reason for this separate control is expressed in a few words. In Collector vs. Day, 11 Wall. 113, also cited in Leprohon's case, "Any Government whose "means are employed in conducting its operations, if subject to the con- "trol of another and distinct Government, can only exist at the mercy "of that Government."

We are thus brought down to the broad question how far the section 28, C. 1., the local Administration of Justice Act, 1881, comes within the power given by sub-section 14, section 92, British North America Act, and to what extent the local Legislature has power to make rules, or to delegate to the Lieut.-Governor-in-Council the power to make Rules regulating the procedure of Supreme Court. This latter power, (it was pressed by the Attorney-General at the close of his argument) had been recognized by the Supreme Court of the Province in three separate Judgments delivered by the three several Judges on different occasions, and had thereby become the Judicially declared Law of the Land. With reference to these Judgments each Judge has to speak as to the one delivered by himself, because, incredible as it seems, in a Province where many of the most complicated questions have arisen since the Union, affecting the Constitution and powers of the Government, no provision whatever is made for reporting the decisions of the Court, or of the separate Judges, or of making any reference to what might be termed an official declaration of what the Law is. All knowledge of the reasons for the decisions depends merely upon verbal statements, or the voluntary action of a Judge in giving a copy of his Judgment to one of the newspapers, which may or may not publish it, as inclination dictates. A degree of parsimony, which in the interests of suitors coming before the Court, and of the public at large, it is not exceptional to pronounce as inexcusable.

In the case of Pamphlet vs. Irvine, heard before myself in Auugst, 1880, the questions now raised did not then arise. In that case the point was: That under the local Administration of Justice Act, 1881, the local Legislature having under section 17 of the Judicature Act, 1878, directed the Lieut.-Governor-in-Council to make Rules of the Supreme Court for carrying that Act into effect. he had no power to issue a Proclamation directing somebody else to make those Rules. And it was held that he had no such power, that the Legislature having selected him to discharge that duty, upon the principle of "Delegatus non potest delegare," he could not transfer either the power or the duty to any one else, a decision to which I still adhere; but the questions were not then raised which are now raised for the first time in the Province, namely: First, That the local Legislature itself had no power to make Rules regulating the procedure of the Supreme Court. Secondly, That if it had such power, it must exercise it itself, and could not delegate it to the Governor-in-Council. Thirdly, If it had such power and had exercised it by adopting certain Rules called the "Supreme Court Rules,

"1880," and making them Law by Statutory enactment, it could not delegate to the Lieut.-Governor-in-Council the power of making Rules to alter or revoke the Rules so adopted and made Statutory; and fourthly, That the Rule made, under such last-named assumed power, directing the Full Court to sit on the 19th of December, was not only illegal on that ground, but also as being directly inconsistent with the positive enactment of the Statute, which authorized the Lieut.-Governor to make such Rules as were not inconsistent with the Statute, which that manifestly was. The reasoning and authorities cited in Pamphlet vs. Irving, to which I now refer and add a copy hereto, as there are no reports from which it can be quoted, thus become on the question of delegated authority, so far as bearing upon the questions now raised, in point, and are fully sustained by Cooley on Constitutional Limitation, 141 et. section 29.

Such legislation as the present, it may further be said, though it does not in words, yet it does in fact indirectly, if not directly, interfere with the trade and commerce of the country. For what shipowner, British, Foreign or Colonial, will send his ship and cargo into a country where under an alleged claim of regulating procedure in Civil matters in the Courts of the Province, the Local Legislature or its Government, authorized by its Legislature, can when legal troubles or difficulties have arisen, and the intervention of the Superior Courts in the Province has been invoked between such owners and the inhabitants, close down the doors of Justice, deny the right of being heard, and tell him all adjudication upon his rights shall be refused for one year, or five years, or ten years, or if the claim of "Provincial omnipotence" holds good, for ever. What trade or commerce can flourish under such circumstances?

Such ex post facto legislation is unknown to English Law; is directly in violation of the Constitution, and without sanction from any of the powers conceded by the British North America Act. It is difficult within the limits of Judicial restraint to find words sufficiently strong to condemn it.

Dangerous as are the uses to which such a power may be converted, it is, nevertheless, in the absence of any Judicial authority as to the Constitutional construction now for the first time raised, and put upon the 14th sub-section of section 92, and in the presence of the fact that in one or more of the Provinces, local legislation has been occasionally passed under a different impression, it is, I say, only after long and careful consideration that I have felt compelled to come to the conclusion that the Local Legislature has not the power to make Rules to govern the Procedure of the Supreme Court of the Province, or to delegate that power to any one else, and that it cannot legislate in a way to deprive suitors of the right of access to that Court, in matters coming within its jurisdiction, or impair the use the Dominion Government and Parliament can make of that Court; and that it is not necessary to wait until a case arises in which Dominion interests are involved, so to decide; but if the legislation be capable of being so used, it must, whenever the objection is taken, be pronounced *ultra vires*.

I have said in the absence of any Judicial authority, for it must be remembered that the case of Valin *vs.* Langlois, conclusive as it is, to the extent to which it goes does not yet cover the whole ground raised in this case, for the points now raised were not then brought up. That case established conclusively the right of the Dominion Parliament to

the use of the Superior Courts of the Provinces for Dominion purposes, and to the further undoubted right of regulating procedure in those Courts, so far as was essential for those purposes, but it was not necessary then to consider, or to decide, whether the entire control of the procedure in those Courts was not withdrawn from the local Legislature by the effect of the 91st section, and the words of limitation in the 92nd section and sub-section 14 of the 92nd section and of the 129th section, and that though the Local Legislature might have the undoubted right to legislate as to all matters relating to the Administration of Justice constitutionally coming within their control under the 92nd section, yet whether the mode or procedure for carrying out that legislation, when suits were instituted in the Superior Courts, must not be left to the Courts themselves to regulate, under their Common Law powers, or statutory powers, existing at the time of the Union, or under such Rules as the Dominion Parliament might prescribe or authorize to be made for heir governance. Whether in fact such Courts could be considered as coming within the exclusive term "Provincial Courts," designated in that sub-section over which the local Legislature, it is not questioned, has the absolute control, and also the exclusive power and privilege of constituting, organizing and maintaining.

There is yet another point to be considered. Among the objections raised is one to the constitutionality of the application of the "Judicial District Act 1879" under which the power is claimed by the Local Government of dislocating the Judges and enforcing through the operation of the Dominion Government their compulsory residence in certain assigned Districts. Coinciding to the fullest extent in the views expressed by the Chief Justice and Mr. Justice Crease, as to the injurious tendency of such a measure upon a uniform administration of Justice throughout the Province, and in the absence of any adjudication, admitting for the sake of argument, that the power to divide the Province into judicial Districts falls within the legislative power of the Local Legislature under the 14, subsection 92, it may nevertheless be questioned how far a restriction as to residence, in the absence of any Imperial or Dominion legislation on the subject can be constitutional or legal or morally obligatory even upon Judges appointed after that Act was passed, but clearly it cannot be retrospective in its operation as to judges holding their appointments and Commissions in and to British Columbia long antecedent (ranging from nine and ten to twenty years,) to its enactment, and any action of the Imperial or Dominion Government thereon would be governed by that principle. Their Commissions were restricted to no locality in British Columbia, their tenure of office under those commissions was during "good behaviour" a statutory protection under Imperial Legislation not only to themselves, but to the suitor in the courts and to the public at large against undue Government pressure of any kind or from any quarter, a provision absolutely necessary to secure the Independence of the Bench and impartial administration of Justice.

It is idle to say that a power to send a Judge into comparative exile and to inflict expense and ruin on himself and his family will not produce a disastrous influence on his conduct. It must become servile obedience or forced resignation. If that be an incident of the office he holds it should be one attached by Law at the time of his appointment, and a risk which he should have the opportunity of accepting or refusing—but to force it upon him in the decline of life, and after years of Judicial

service, is a breach of the conditions of his appointment, and in violation of Constitutional Law and Practice.

The British North America Act is the fundamental Law and defines with clearness the tenure of the judicial office. The Parliament of Canada has passed no Law in contravention of or trenching on this definition. A Local Legislature cannot confer on the Government of the Dominion power which the British North America Act or Canadian Parliament itself has not given. At page 54 Cooley says, "The constitution of "the state "is higherin authority than law,direction or order made by any "body or "any officer assuming to act under it. In any case of conflict the "fundamental Law must govern and the Act in conflict with it must be "treated as of no legal validity. The courts have thus devolved upon "them the duty to pass upon the Constitutional validity sometimes of "Legislative and sometimes of executive acts (55)."

In the notes at page 26., "It is idle to say that the authority of each "branch of the Government is defined and limited by the constitution if "there be not an independant power able and willing to enforce the "limitations. Experience proves that the Consitution is thoughtlessly but "habitually violated and the sacrifice of individual rights is too remotely "connected with the objects and contests of the masses to attract their "attention. The judges ought to regulate their decisions by the funda-"mental laws rather than by those which are not fundamental."

Nor is it neeessary, says he at pages 210 and 11. "That the Courts "in every case, before they can set aside a law as invalid, should be able "to find in the Constitution some specific inhibition which has been dis-"regarded, or some express command which has been disobeyed. Pro-"hibitions are only important when they are in the nature of exceptions "to a general grant of power, and if the authority to do an act has not "been granted by the sovereign to its Representative it cannot be nec-"essary to prohibit its being done."

The British North America Act is the fundamental Law; it gives power to the Governor-General to appoint the Judges and to remove them from office on address of the senate and House of Commons, but nowhere when once appointed without condition or limitation as to residence save that it be within the Province to which they may be appointed, does it give the power to order the Judges to change their residences to particular sections of that Province, at the dictation of the Local Legislature contrary to the terms of their Commission and the law under which their appointments were made. It was not necessary therefore to inhibit the exercise of such a power, for it never was granted. A fortiori where such change is in no way essential to the efficient discharge of the duties attached to the appointment. The privileges conferred by the British North America Act and the Dominion Legislature are statutory inducements. The power which confers, may remove, should public exigency demand, but that Power has not yet spoken, and, should it do so, it will take care that the exercise of any authority it gives shall not work injustice.

In the case of Calder *vs.* Rule 3, Dallas, 390 Chase J. says "every law "that takes away or impairs rights vested, agreeably to existing Laws is "restrospective, and is generally unjust, and may be oppressive."

Cooley at page 325, speaking of ex-post facto laws, says. "If it shall "subject an individual to a pecuniary penalty for an act which when "done involved no responsibility, or if it deprives a party of any valua-

"ble right, like the right to follow a lawful calling, for acts which were "innocent or at least not punishable when committed, the law will be ex-post "facto in the Constitutional sense, notwithstanding it does not in terms "declare the acts to which the penalty is attached criminal" Can there be any question that to drive a man from his house and home, selected, occupied and acquired in thorough accordance with existing law, is not depriving him of a valuable right, when no charge of a nature forfeiting that right is alleged against him? The same author at pages 77 and 78 says. "The implications from the provisions of a constitution are some- "times exceedingly important, and have a large influence on its construction. One "rule of construction" is, that when the constitution defines "the circumstances under which a right may be exercised or a penalty "imposed, the specification is an implied prohibition against legislative "interference to add to the condition or to extend the penalty to other "cases."

At page 138, after referring to powers specially conferred by the constitution upon the Governor or any other specified officer, he adds, "Other powers or duties the Executive cannot exercise, or assume ex- "cept by Legislative authority, and the power which in its discretion it "confers, it may also in its discretion withhold or confer to other hands, and in a note bearing on this point he quotes from an American case the following observations. "In deciding this question, as to the authority "of the Governor recurrence must be had to the constitution; that fur- "nishes the only Rule by which the court can be governed. That is the "Charter of the Governor's authority, all the powers delegated to him "or in accordance with that Instrument he is entitled to exercise and "none others." See also the Chief Justice's observations in Valin *vs.* Langlois, hereinbefore quoted, as to Statutory rights. Where then in the Constitution —the British North America Act, is any power of the character claimed given to the Governor-General, a power, it is contended to be exercised at the instance of the Local Legislature, whether the movement, in the language of Mr. Justice Patterson, may "spring from "caprice or from crude theories of political economy, or from any cause "whatever, being a matter of speculation."

So strongly is this principle of the inviolability of the status of the Judges regarded under the Federal Government of the United States, that that Government never imposes, or permits to be imposed upon, the Judges once appointed by the Federal Government, any additional burdens or restrictions, without special legislation by Congress to that effect, and should it in view of paramount public interest do so, not without providing additional compensation, thus shewing that in the American view, the Constitution requires the presumed compact, resulting from the appointment, to be construed in the light of the existing law at the time of the appointment, and this has been the rule from the dawn of the Republic.

Vide Act of Congress, May 26, 1824, section 13, 4 United States Statutes at Large, page 50, relative to Federal Judge of Missouri;

Do. do. June 17, 1844, 5 do. 676, relative to Louisiana, Arkansas, Mississippi and Alabama;

Do. do. June 14, 1860, section 7, 12 Statutes do. page 35, relative to California.

It must, therefore, be considered that in Law no authority is given to the Dominion Ministry to advise the Governor-General to order the

Judges in British Columbia, or any one of them, holding his or their Commissions and appointments antecedent to the local Judicial District Act, 1879, to reside in any specially assigned District of the Province, and consequently any order to that effect made under such advice would be unconstitutional.

A judgment to this effect was given in this Court in December last, in the case of The Queen ex relatione the City of Victoria *vs.* Vieux Violand, from which the counsel engaged declined to appeal.

As to this Judicial District Bill, it may be urged, the Judges are interested, for if legal, it affects their position and tenure of office. That objection, however, where all are concerned, cannot be sustained, for if so the suitor would be denied access to any Court of competent jurisdiction in the Province. In such a case it is held that the hearing becomes a matter of necessity and is unimpeachable as if "An action were brought "against all the Judges of the Court of Common Pleas in a matter over "which they had exclusive jurisdiction." Per Lord Cranworth, C., Ranger vs. Great Western Railway, C., 5 House of Lords Cases, 88. See also Broom's Legal Maxims, Edn. 1874, and the cases there cited.

I think, therefore, that the objections taken by the learned Counsel, Mr. Theodore Davie, for the plaintiff, must be sustained,—that the legislation restricting him from being heard is unconstitutional and void, and the Rules of Procedure alleged to have been promulgated by the Lieut.-Governor-in-Council for the governance of this Court are inoperative, and that this Court is bound in duty to exercise the authority it possesses to afford him an opportunity of bringing the plaintiff's case at as early a day as possible before the Court, in order to test the validity of the points raised by him at the trial of this cause. And I may add that the conclusions at which I have arrived have been materially confirmed by the fact that every conceivable and almost inconceivable argument has in a lengthy, most careful and able contention by the Attorney-General as *amicus curiæ* been brought forward against such conclusions without any effect other than to strengthen them.

The following are the conclusions at which it may be briefly said the Chief Justice, Mr. Justice Crease and myself, who have heard and considered the argument, have arrived, (Mr. Justice McCreight whose assistance would have been most valuable, having since July last been absent at Cariboo, and not having had any opportunity of conferring with his brother Judges on the important legal questions constantly coming before the Court:)

1st. That the Supreme Court is not a Provincial court within the meaning of the 14, subsection of section 92 of the British North America Act 1867.

2nd. That the Local Legislature has no control over its procedure, and cannot legislate so as to prevent suitors having access to that court, and having their causes heard, and carried on to final adjudication, so as to have an appeal to the Supreme Court of Canada.

3rd. That the Local Legislature cannot itself make Rules to govern the procedure of the Court or delegate the power to the Lieut.-Governor in council to do so.

4th. That the application of the Judicial District Act to Judges appointed and holding their commissions prior to its enactment is unconstitutional and void.

5th. That the Judges are Dominion, not Provincial officers.

6th. That in these respects the Judicial District Act; the Better Administration of Justice Act, 1878, and the Local Administration of Justice Act, C. I., 1881, are ultra vires.

7th. That the Plaintiff is entitled to have the relief asked for, and the court is bound in Law to hear his motion, and permit him to proceed with his cause.

The Hon. GEO. A. WALKEM, Q. C., Attorney-General, *Amicus Curiæ*.

THEODORE DAVIE, Esq., Counsel for the Plaintiff.

MONTAGUE TYRWHITT DRAKE and CHARLES EDWARD POOLEY, Esqs., of Counsel for Defendants.

JAMES CHARLES PREVOST, Esq., Registrar.

PAGE.	LINE
1	13
6	34
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10	41
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PAGE.	LINE
32	1
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41	2 and 3
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44	29
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48	44
48	46
49	13

ERRATA ET CORRIGENDA.

PAGE.	LINE.	READ	INSTEAD OF
1	13	absenté	(omit the accent.)
6	34	indelible	indelable.
6	8	(insert "been" after "since".	
10	41	made	created.
10	47	was	were.
10	47	comma after "here".	
11	2	insert "here" after "court".	
12	2	course	condition.
14	last but 1	functions	unctions.
15	41	"everywhere" between "not" and "sovereign".	
16	24	Judicature	Judicial.
16	46	insert "alone" after "which".	
17	23	insert "universal" before "sovereignty".	
19	last line	comma after "constituted".	
21	35	judges	jugdes.
22	25	comma after "day",	
23	33	vulgus	vulgas.
24	34	absurdum	absrudum.
27	1	"suitor," "of"	"suitor" "if".
27	15	comma after "Amendments".	
28	36	comma after "Victoria".	
29	10	add a foot note to "Province" (see 32nd sec., quoted ante p. 12.)	
2	1	insert date: 10th February, 1882.	

PAGE.	LINE.	
32	1	for "rated" lege "raised".
35	16	for "been" lege "and".
37	43	after "to do" comma, "then".
38	6	for "1869" lege "1867".
38	14	after "complaints", comma.
38	25	for "these" lege "That Court".
40	18	dele "to".
40	32	for "Doutro" lege "Doutre".
41	2 and 3 from bottom,	after "legislatures" insert comma "so".
42		all the judgment of Gwynne, J., in inverted commas.
43	38	for "is" lege "us".
44	14	for—ever "nature, insert "ever nature".
44	25	for "via" lege "Vice".
44	29	for "legislative" read "legislation."
46	45	for "in" read "is".
46	46	dele "is".
48	44	for "will be" insert "with".
48	46	for "statutes" read "status".
49	13	for "N.C." lege "N. S."

50	4	dele "respective".
50	34	"a fortiori the elder ones" in brackets.
50	51	for "indispensible" read "indispensable".
50	46	for "His Excellency" lege "His Excellency the Governor General.
51	13	for "Justice, Still" lege "Justice, still". (small s.)
51	37	for "and" read "but".
50 to 52, line 4, "to discretion" in inverted commas.		
52	7	after "Judge" add "who quoted this,"
55	28	for "meteing" lege "meting".
56	24	for "exertion" lege "exercise".
56	42	for "report" lege "repeal".

PAGE.	LINE.	
62	34	1581 to 1881.
63	7	nitra to ultra.
94	9	1877 to 1867.
66	11	strike out "ex."
68	3	ralioni to ratione.
70	17	18the to 18th.
70	19	enforce to "in force".
75	14	section 29 to "seq."
76	15	heir to their.
77	6 from below—Rule to Bull.	
78	20	confer to confide.
64	5	from "If the projected", to line 16, "for such purpose", in inverted commas.
79	9	Bill to "Act."
79	36	July to May.
66	18	90, 99, 130 to "96, 99, 100 and 130."
78	30	after Gov.-General, ?